No. 83-887

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

JUNIOR S. JACKSON,

*Petitioner,*

vs.

CONSOLIDATED RAIL CORPORATION,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LAWRENCE W. LECK
LAWRENCE W. LECK
AND ASSOCIATES, LTD.
111 West Washington Street
Chicago, Illinois 60602
(312) 641-2383

JOSEPH S. WITKOWSKI
JOSEPH S. WITKOWSKI
AND ASSOCIATES, P.C.
111 West Washington Street
Chicago, Illinois 60602
(312) 641-2383

*Attorneys for Petitioner*

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

## QUESTIONS PRESENTED FOR REVIEW

Whether the opinion of the Court of Appeals should be allowed to stand where it threatens the very viability of the FELA in that the opinion holds that an injured worker may be interfered with and discharged by his federal employer (railroad) for pursuing an FELA claim and that no Court has the power to remedy this obvious abuse, notwithstanding petitioner's Seventh Amendment right to jury trials as to both his FELA and retaliation claims and said opinion affects all present and future FELA claimants.

When a federal employer (railroad) conceded it fired its employee for filing an FELA suit for injuries on the job, is the employee barred from bringing a tort action for retaliation against the employer for this interference with his FELA rights, or does the RLA which has exclusive jurisdiction over minor disputes arising from the collective bargaining agreement preempt *all* torts committed by a railroad against an employee which arise in an employment context even though the tort does *not* arise out of the collective bargaining agreement?

Does the failure to raise a preemption defense until after jury verdict result in waiver of that defense?

## TABLE OF CONTENTS

## LIST OF AUTHORITIES

*Cases*

*Statutes*

*Other Authorities*

In The

# Supreme Court of the United States

October Term, 1983

---

JUNIOR S. JACKSON,

*Petitioner,*

vs.

CONSOLIDATED RAIL CORPORATION,

*Respondent.*

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 717 F.2d 1045 (7th Cir. 1983) and appears in Appendix A hereof. The opinions of the District Court dated April 4, 1981 and July 28, 1982, respectively are reported and appear in Appendices B and C.

## JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on September 1, 1983 with Judge Posner dissenting. This Petition for Certiorari

was filed within 90 days after the judgment of the United States Court of Appeals. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

## STATUTORY PROVISIONS INVOLVED

### UNITED STATES CODE, TITLE 45
### FEDERAL EMPLOYERS LIABILITY ACT

§51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence;

Every common carrier by railroad while engaging in commerce between any of the several States or Territories . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

§55. Contract, rule, regulation, or device exempting from liability; set-off;

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void . . .

§60. Penalty for suppression of voluntary information incident to accidents;

Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntary information to a person in interest as to the facts incident to the injury or death of any employee, shall be void,

and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense . . .

## UNITED STATES CODE, TITLE 45
## RAILWAY LABOR ACT

§151a. General Purposes

The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; . . . (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

§153 First (i) National Railroad Adjustment Board-Establishment; composition; powers and duties; divisions; hearings and awards; judicial review

The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, . . . shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the [NRAB] with a full statement of the facts and all supporting data bearing upon the disputes.

## STATEMENT OF THE CASE

Plaintiff Junior S. Jackson, age 57, with a 4th grade education, is an Indiana citizen. He was employed by Defendant Conrail and its predecessor for 37½ years. At all material times his work consisted of manual labor, primarily track maintenance. A suit in the U.S. District Court for the Northern District of Illinois was brought under the FELA Section 51 *et seq.*, for injuries sustained when he worked over 81½ consecutive hours without relief and without adequate assistance. On the day his deposition was scheduled, the Defendant notified Plaintiff that disciplinary charges were being placed against him arising out of the same incidents that gave rise to his FELA claim. Ten days after he filed an Amended Complaint alleging that the railroad was interfering with his FELA claim, he was discharged by the railroad. Plaintiff then sought injunctive relief in the form of reinstatement and back pay before the same U.S. District Court before which the FELA claim was pending. The U.S. District Court ordered Conrail to pay the Plaintiff from the date of termination until the date of hearing on the Motion for injunctive relief, a period of approximately ten days. Conrail did not appeal the Court's Order, but paid the Plaintiff for back pay pursuant to the Court's ruling. The Court subsequently denied Plaintiff's request for injunctive relief in the form of reinstatement indicating that Plaintiff might pursue his remedy at law, i.e. a cause of action in the Courts for retaliation for interference with his §51 FELA rights which resulted in his discharge. Plaintiff then amended his Complaint to include such a claim. Both the physical injury case under the FELA and the §51 interference/retaliation were tried

together. The jury rendered a verdict for the physical injury in favor of the Plaintiff in the amount of $13,500.00. The jury rendered a verdict for interference/retaliation in the amount of $182,000.00 compensatory damages and $1,200,000.00 punitive damages.

After the verdict, Conrail for the first time by way of a Post-Trial Motion, raised the issue whether the District Court had subject matter jurisdiction over the interference/retaliation case. The trial court denied Defendant's Post-Trial Motion as to the jurisdictional issue but set aside the punitive damage award on other grounds. The Defendant appealed and contested only the jurisdictional issue to the Seventh Circuit Court of Appeals and Plaintiff cross-appealed the U.S. District Court's ruling on punitive damages. The Court of Appeals in a 2-1 decision held, while acknowledging that tension existed between the FELA and the RLA, that the RLA preempted the §51 interference/retaliation claim in the U.S. District Court and that Jackson's, pursuant to *Andrews v. Louisville & Nashville R.R. Co.*, exclusive remedy lay with the grievance procedure pursuant to the Collective Bargaining Agreement and with the National Railroad Adjustment Board (NRAB) created by the RLA 45 U.S.C. §153. The Court held specifically that the U.S. Supreme Court's decision in *Farmer* was distinguishable because there was no specific statutory remedy for the §51 interference/retaliation claim.

The District Court held that it had subject matter jurisdiction of the interference/retaliatory cause of action pursuant to both Indiana law and pursuant to §51 *et seq.* of the FELA and that the cause of action was clearly outside the scope of *Andrews v. Louisville & Nashville R.R. Co.*

## REASONS FOR GRANTING THE WRIT

**THE WRIT OF CERTIORARI SHOULD BE ALLOWED BECAUSE THE COURT OF APPEALS IS IN ERROR IN APPLYING *ANDREWS v. LOUISVILLE & NASHVILLE R.R. CO.*, AND ITS RULING IS CONTRARY TO THE FEDERAL EMPLOYERS LIABILITY ACT AND THE INDIANA LAW OF RETALIATORY DISCHARGE AND BECAUSE IT VITIATES THE RIGHT OF RAILROAD WORKERS TO FILE SUIT AND HAVE A JURY TRIAL UNDER THE FELA FOR INJURIES SUSTAINED IN THE COURSE OF THEIR EMPLOYMENT FREE FROM COERCION AND INTIMIDATION.**

To allow the 2-1 decision of the Seventh Circuit Court of Appeals to stand which sanctions the conceded retaliatory discharge of a railroad worker who files a lawsuit under the FELA will have a devastating impact on all employees covered by the FELA. The chilling effect of such a decision will extend not only to prospective FELA plaintiffs, but to all employees and their families. It could well be expected to prevent testimony unfavorable to the railroad, the filing of lawsuits, the full settlement of claims, etc. The Congress, however, intended the Act to provide an **effective** and readily available remedy.

That remedy is rendered near meaningless by the Seventh Circuit's decision based in large part on a misapplication of *Andrews v. Louisville & Nashville Railroad Company*, 406 U.S. 320 (1972). The right to proceed freely under the FELA and the right to proceed in collective bargaining are separate from one another; each is legally independent in origin. (See *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981), (rights under Federal Labor Standards Act independent of collective bargaining agreement); *Alexander v. Gardner-Denver Co.*, 415

U.S. 36, 94 S.Ct. 1011 (1974) (Collective bargaining agreement did not bar action under Title Seven); *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978) (State trespass law not preempted by federal labor law); *Farmer v. United Brotherhood of Carpenters and Joiners*, 430 U.S. 290 (1977) (Rights arising under the law for outrageous conduct not precluded by federal labor law); *Colorado Anti-Discrimination Commission, et al. v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963) (Right to be free from race discrimination not precluded by the Railway Labor Act).

The confusion of the Appeals Court in intertwining those rights has given the railroad industry a more effective coercive device or method than it could have ever hoped for. Who is more vulnerable to intimidation than the injured worker with a family to support? If that worker persists in prosecuting a claim under the FELA the Seventh Circuit's opinion in *Jackson* need only be called to the injured claimant's attention. For what the *Jackson* opinion says to the injured worker is, "The railroad can fire you for filing a lawsuit under the FELA for job-related injuries and there is not a court in this land that can stop us. If you have any remedy it is administrative wherein the only possible relief is before the N.R.A.B. whose expertise is limited to the interpretation of collective bargaining agreements concerning working conditions, pay, and rules, and which in 1982 ran out of funds leaving 21,000 cases in limbo at mid-year." What injured worker knowing under *Jackson* he can be fired with impunity will pursue an FELA claim? What attorney in good faith can advise an injured worker client to file an FELA claim knowing the court system will not protect him? What meaning does the FELA have if a worker's choice

is recovery under the Act or discharge from employment? Plaintiff requests the Court take this matter for the very viability of the FELA is at stake. It is an urgent matter to every present and future claimant under the Act, and the families that depend upon them for support. Beyond that, if the *Jackson* opinion stands, the social cost of the workers' injuries will increasingly be borne by government, state, local, and federal. The industry which should bear that social cost will have extricated itself from its responsibility by the very existence of the *Jackson* opinion. The ultimate deterrent to the FELA is non-judicially protected termination for availing one's self of access to the court system. The barbarous defenses of the pre-FELA period wreaked less havoc than the potential harm done by the Seventh Circuit's judicially sanctioned retaliation for prosecuting FELA created rights.

In *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 302 (1972) this court decided that minor disputes arising out of a collective bargaining agreement were within the exclusive jurisdiction of the Railway Labor Act. The Seventh Circuit, in its opinion, erroneously points out that the Plaintiff Jackson's right not to be discharged in the present cause grows out of the collective bargaining agreement.

Defendant, railroad, in the case at bar conceded that it interfered with Jackson's FELA right to a jury trial and ultimately fired him for filing same by not raising or contesting on appeal the factual findings of the district court and instead only raised the jurisdictional issue. Jackson's claim rested not upon any interpretation of the collective bargaining agreement but upon his rights under §51 *et seq.* of the FELA which provided him with a cause of action for injury on the job and his right under Indiana's common law for retaliatory

discharge. In *Andrews* the Plaintiff was terminated after having been off for a number of months as a result of an automobile accident. Andrews termination had nothing to do with exercising any rights under the Federal Employers' Liability Act. The parties conceded that the right not to be discharged arose out of the collective bargaining agreement. Therefore the *Andrews* court was correct in saying the collective bargaining agreement was his sole recourse not to be discharged. In the case at bar the Defendant railroad introduced no evidence that retaliatory conduct for filing an FELA was covered under its collective bargaining agreement with the railroad. The Seventh Circuit concluded, however, that it was covered without any evidence at all to support the contention.

Jackson goes beyond the mere right not to be discharged. The termination of Jackson from his employment was the final step in a pattern of interference with the railroad with his FELA claim. This pattern consisted of a) the railroad claim agent sending a letter to Jackson's supervisor to institute disciplinary actions after the lawsuit was filed, b) sending the Plaintiff, on the day of his deposition, a notice that disciplinary charges had been filed against him arising out of the incident which gave rise to the lawsuit, c) the intentional filing of false charges against the Plaintiff, d) terminating him ten days after he filed an Amended Complaint alleging that the railroad was interfering with his FELA rights. Thus Jackson's claim is factually and legally distinguishable from that of *Andrews* in that his claim for interference and discharge are directly related to the actions of the railroad in response to his filing a claim pursuant to Section 51 *et seq.* of the FELA. Surely this court in *Andrews* could not have intended the interpretation of that opinion placed upon it by the Seventh Circuit Court of Appeals. As Circuit Judge Posner points out in his dissent,

"But Jackson claims to have been fired for exercising a statutory right, and such a claim is not a grievance founded on the collective bargaining agreement.

"It is not a grievance because it would exist even if there were no collective bargaining agreement, unlike the situation in *Andrews*. There it was 'conceded by all that the only source of petitioner's right not to be discharged, and therefore to treat an alleged discharge as a 'wrongful' one that entitles him to damages, is the collective-bargaining agreement between the employer and the union.' 406 U.S. at 324. See also *de la Rosa Sanchez v. Eastern Airlines, Inc.*, 574 F.2d 29, 32-33 (1st Cir. 1978). The collective bargaining agreement in this case is no more the source of Jackson's cause of action than if he were suing Conrail for a battery committed against him by his supervisor." *Jackson v. Conrail*, 717 F.2d 1045 at 1059.

Jackson's right not to be interfered with and not to be discharged by Conrail under the circumstances of this case arose out of the §51 *et seq.* of the FELA and the law of the state of Indiana. Jackson raised a common law cause of action in tort, first recognized in Indiana in 1973 and now recognized by case law and by statute in numerous states.[1] The tort of retaliatory

[1] For example:

*Frampton v. Central Indiana Gas Company*, 260 Ind. 249, 297 N.E.2d 425 (1973); *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980); *Piezo Technology v. Smith*, 413 So.2d 121 (Fla. App. 1982); *Parnar v. Americana Hotels, Inc.*, 652 P.2d 625 (Hawaii 1982); *Kelsay v. Motorola, Inc.*, 74 I.2d 172 (1978); *Sventko v. Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 1251 (1977); *Missouri Statutes Annot.* Ch. 287 §780; *Monge v. Beebe Rubber Co.*, 114 N.W. 130, 316 A.2d 549 (1974); *Brown v. Transcon Lines*, 284 Or. 597, 588 P.2d 1087 (1978);

(Footnote continued on following page)

discharge did not e 'st anywhere in the United States at the time of the Supreme Court's opinion in *Andrews*. In fact, this court's decision in *Pickering v. Board of Education of Township High School District 205, Will County*, 391 U.S. 563 prohibiting the discharge of a teacher for exercise of his First Amendment right was an early fashioning of this tort. The basis of the tort of retaliatory discharge is that one should not be terminated for exercising a right protected by public policy whether that right is constitutionally or congressionally provided.

## I.

## SPECIFIC AND IMPLIED RIGHTS UNDER THE FELA.

The Seventh Circuit wrongfully reasoned that Jackson's federal right could not be vindicated because there had been no specific statutory remedy for such vindication. The Circuit Court of Appeals distinguishes this Court's decision in *Barrentine*, 450 U.S. 728; *Alexander*, 415 U.S. 36; *Sears, Roebuck*, 436 U.S. 180; *Farmer*, 430 U.S. 290; *Colorado*, 372 U.S. 714, from the present cause by taking a position that there is no specific statutory remedy which allows the enforcement of workers rights who have been retaliated against for filing an FELA claim under the FELA. Plaintiff argues that implicit in §51 of the FELA is the right to enforce one's right under the statute through an action of the type brought here. Particularly an injured party must have access in that forum, i.e. the court system provided by the Congress for the exercise

---

[1] *continued*

*Reuther v. Fowler & Williams*, 255 Pa. Super. 28, 386 A.2d 119 (1978); *Texas Steel Company v. Douglas*, 533 S.W.2d 111 (Tex. App. 1976); *Harless v. First National Bank in Fairmont*, 246 S.W.2d 270 (W. Va. 1978). See "Keeping Informed—Your Right to Fire," *Harvard Business Review*, March/April 1983, No. 2.

of these rights and an administrative board cannot enforce the powers of the U.S. District Court. If the Court's processes are being interfered with by a railroad which was conceded here, the only logical solution is to allow the judicial system to punish that interference. Section 51 of the FELA cannot be meaningful unless the right to bring an action for interference with FELA suits is enforceable.

Plaintiff argues below that there are specific statutory provisions of the FELA which give rise to a cause of action for interference, to-wit §55 and §60 of the Act. However, absent that there is an implied right under this Court's tort set forth in *Cort v. Ash*, 422 U.S. 66 (1975)[2] which would give the Plaintiff a private cause of action. To imply such a action of action is consistent with the concern of the Congress and this Court with the implementation of the FELA.

Section 55 of the FELA provides in part that:

> **"Any *contract, rule, regulation,* or *device,* whatsoever, the *purpose or intent* of which shall be to enable any common carrier to *exempt itself from any liability* created by this chapter shall to that extent be void."**

The applicability of §55 to Plaintiff's case arises in several ways: *First*, the use of Conrail's rules and regulations in bringing disciplinary proceedings on the day of his deposition was with the purpose of the Defendant Conrail exempting itself from liability; *Second*, the use of Conrail's

---

[2] The application of the *Cort v. Ash* "implied right" test in an FELA context is set forth in Note, *"The Implication of a Private Right of Action Against Coercion Under the Federal Employers' Liability Act,"* 32 Case Western Law Review, 992, 1009-1013 (1982).

rules and regulations as a basis for terminating Plaintiff after he filed an Amended Complaint alleging harassment and interference with his FELA claims was an attempt on Defendant's part to exempt itself from liability; *Third*, all of the actions of the railroad including a claim supervisor's letter to Jackson's supervisor directing that disciplinary action be instituted, a hearing officer testifying he had no evidence whatsoever of a rule violation which the company used as a basis of discharge; the interference with the deposition and termination, constitute a "device" within the meaning of §55. For what occurred was a purposeful and intentional pattern of action designed to have Jackson either abandon his claim or to have him rethink the advisability of pursuing it and thus allow the railroad to exempt itself from liability. This admitted deliberate interference with the prosecution of his case, which the Seventh Circuit has sanctioned by its decision, if allowed to stand, will result in an impermissible chill on the rights of railroad workers to seek compensation for job-related injuries. Clearly the interference with the judicial process is a device under §55. A broad interpretation of the term "device" is supported by the purpose of the act and by case authority. *Kozar v. Chesapeake & Ohio R.R. Co.*, 320 F.Supp. 335, 383-385, 449 F.2d 1238 (6th Cir. 1971), *Stack v. Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 94 Wash.2d 155, 615 P.2d 457 (1980).

A number of courts have recognized the use of §60 of the FELA as a means of preventing interference with an FELA claim. *Hendley v. Central of Georgia R.R. Co.*, 609 F.2d 1146 (5th Cir. 1980), *Stark v. Burlington Northern, Inc.*, 538 F.Supp. 1061 (1982), *Stack, supra, Kozar, supra.* The Seventh Circuit erroneously distinguishes *Hendley* by raising that §60 provides a specific statutory right not to the claimant but only to someone who provides assist-

ance in whatever form to his claim. In fact the Fifth Circuit in *Hendley* implied a private cause of action into §60 which on its face provides penal consequences.

The plaintiff, Hendley, a railroad employee, filed an action in the District Court seeking to enjoin the railroad from conducting a disciplinary hearing against him because he aided other railroad workers in filing their FELA claims. Hendley had helped an FELA claimant photograph a railroad yard. He was then charged with violation of a railroad rule alleging that he was disloyal and a hearing was held and he was suspended.

Hendley then filed suit in the District Court to enjoin the defendant from conducting the disciplinary hearing and alleged that the railroad violated 45 U.S.C. §60 which provides that it is a criminal violation for a railroad to discipline an employee for voluntarily furnishing information in connection with an FELA case.

The District Court denied Hendley's request for an injunction holding that the disciplinary procedure was a "minor dispute" within the exclusive jurisdiction of the National Railroad Adjustment Board.

Upon appeal, the 5th Circuit held that a Federal Court had jurisdiction to hear the case and issue an injunction to prevent the railroad from attempting to discipline an employee who voluntarily furnished information to an FELA claimant in violation of 45 U.S.C. §60. The Court held that the issue before them did not involve the interpretation of a collective bargaining agreement which is an appropriate matter for resolution by arbitration (i.e., a minor dispute).

In the case at bar Defendant Railroad, and the Court of Appeals take the identical position that the railroad took in Hendley, which is that the disciplinary procedure

should be within the exclusive jurisdiction of the National Railroad Adjustment Board.

The *Hendley* Court noted the "chilling effect" of forcing employees to face disciplinary boards because of their assistance to a fellow employee who files an FELA claim. (609 F.2d 1152-1153). If the "chilling effect" of taking disciplinary action against those who *assist* an FELA plaintiff was recognized as in *Hendley*, it is difficult to understand how the same protection is not afforded to the *actual employee* who is disciplined for filing an FELA claim.

The *Hendley* court further commented as to the tremendous pressure exerted by the railroad industry to prevent the filing and ultimate success of FELA claims, and cited the conduct of certain railroads as being particularly aggressive in their efforts to defeat the claims of those injured even when the victims are valuable employees. 609 F.2d at pg. 1152.

Congress surely would not intend to allow access to the state or District Courts to an employee who is suspended for furnishing information to an FELA claimant under 45 U.S.C. §60 and prevent the FELA claimant himself from exercise of that right when he is disciplined for filing an FELA claim.

The Congress, 60th Congress House Report #1386, Cong. Rec. (1908) and this Court in numerous decisions for example *Harris v. Pennsylvania R.R. Co.*, 361 U.S. 15, *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, *Norfolk & Western Railway v. Leipelt*, 444 U.S. 490 (1980), Note, *Supreme Court Certiorari Policy in Cases Arising Under the FELA*, 69 Harv. L. Rev. 1441 (1956) long been specially concerned with the effective enforcement of the FELA. This Court's interpretation of the intent of Congress relative to the FELA is set forth by Mr. Justice Brennan

in *Kernan v. American Dredging Co.*, 355 U.S. 426, 432 (7th Cir. 1958).

> "In the railroad and shipping industries, however, the FELA and Jones Act provide the framework for determining liability for industrial accidents. But instead of a detailed statute codifying common-law principles, Congress saw fit to enact a statute of the most general terms, thus leaving in large measure to the courts the duty of fashioning remedies for injured employees in a manner analogous to the development of tort remedies at common law. But it is clear that the general congressional intent was to provide liberal recovery for injured workers, *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 508-510, and it is also clear that Congress intended the creation of no static remedy, but one which would be developed and enlarged to meet changing conditions and changing concepts of industry's duty toward its workers."

The Seventh Circuit failed to follow that interpretation and the provisions of §§51, 55 and 60 of the FELA. Unfortunately the effect of the Circuit Court of Appeals decisions goes beyond Jackson's present unemployment. A growing problem exists. At the present time there is pending in the Eighth Circuit Court of Appeals the case of *Landfried v. Missouri Terminal R.R. Co.*, 83-1160 EM (8th Cir. argued September 15, 1983). This case involves the consolidation of the cases of three Plaintiffs (one of whom has over 40 years of service with the Defendant railroad) who have been terminated for filing FELA claims. The District Court similarly misapplied *Andrews* and dismissed their claims. It is respectfully submitted that there is a pressing need for this Court to give direction to the lower federal courts so that the intent of Congress in passing the FELA and the will of this Court in interpreting and applying that intent will not be frustrated and

undermined by common carriers interfering with the judicial powers and using the Seventh Circuit Court of Appeals opinion as a weapon to justify their actions.

## II.

## STATE TORT RETALIATORY DISCHARGE IS NOT PREEMPTED BY THE RLA.

This Court's decision in *Farmer v. Brotherhood of Carpenters Local 25*, 430 U.S. 290 and *Sears, Roebuck v. San Diego District Council of Carpenters*, 436 U.S. 180 (1978) stand as authority for the proposition that when the state interest to be protected is great enough, state claims are not preempted by federal law. In addition to *Farmer* this Court has decided *Colorado Anti-Discrimination Commission v. Continental Airlines*, 372 U.S. 714 (1963) wherein the Court held that neither the Railway Labor Act nor any federal statute precluded a claim pursuant to the Colorado Anti-discrimination Act. So not every state dispute involving a carrier is preempted by the RLA. The Court in examining the RLA in *Colorado Anti-Discrimination* found no provision addressing racial discrimination in hiring. Likewise, in the case at bar, a review of the RLA will show no provision which gives an employee interfered with in the exercise of an FELA claim a right to redress that grievance under the RLA.

The Seventh Circuit's basis for distinguishing *Sears* and *Farmer* is that the RLA has made any grievance arising out of the collective bargaining agreement subject to the exclusive arbitral remedies. The Seventh Circuit in applying *Farmer* to this case indicated that it must examine "the state interest in regulating the conduct in question and the potential for interference with the federal regulatory scheme." 439 U.S. 297. The extent of the state interest *must* be taken as uncontroverted because *Conrail*

*did not challenge that Jackson's claim stated a cause of action under Indiana law.*

In analyzing the potential interference with the federal regulatory scheme, the Seventh Circuit erroneously states that Jackson's claim pursuant to Indiana law is identical to the claim he would have made had he pursued the grievance through administrative channels and consequently the potential interference with the federal regulatory interest was too great to permit an exception of the preemption doctrine. First, there is no indication as to what evidence could have been presented at administrative hearings.

Second, it must be remembered that the RLA through the National Railway Adjustment Board (NRAB) would focus on whether Jackson violated safety rules. This is because the NRAB handles disputes "growing out of grievances or out of the interpretation or application of agreement concerning pay, rules, or working conditions . . .". The NRAB could perform its function without at all deciding whether the railroad's conduct was a pretext for retaliatory conduct.

Third, the inherent power of the United States District Court to conduct its business should not be subject to review by an administrative board. The questions of interference with and retaliation for pending litigation is not included in a collective bargaining agreement. In the context of a suit for retaliation, the existence of disciplinary charges and the violation or lack thereof of company rules are only evidence as to the intent or motivation of the employer in bringing those charges. A trier of fact in the judicial system is not determining whether a discharge of employee is warranted by the company rules but whether the employer's intent was retaliatory. Arguably even if

an administrative board could find that Jackson violated the rules it would not be *res judicata* as to his retaliatory claim since the railroad's intent in disciplining Jackson would not be an issue before the board.

Nothing that would result from Jackson's bringing suit under the common law of Indiana would thwart or interfere with the operation of the mediation machinery of the Railway Labor Act. The machinery functions in a different area—interpretation of collective bargaining agreements and adjustments of disputes over working conditions. This lawsuit is not a threat to industrial peace and it does not interfere with the federal scheme—which always has been the purpose of the RLA to protect. Also, Indiana's interest in protecting citizens from the underlying conduct is surely much greater than the Jackson decision concedes. Indiana was the first state to recognize a common law cause of action for retaliatory discharge. *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973). The opinion of the Indiana Supreme Court forcefully demonstrates Indiana's public policy for protecting its citizens from employers' abuses.

> "The Act creates a *duty* in the employer to compensate employees for work-related injuries . . . and a *right* in the employee to receive such compensation . . . Retaliatory discharge for filing a workmen's compensation claim is a wrongful, unconscionable act and should be actionable in a court of law." *Frampton*, 297 N.E.2d at 427, 428.

In *Farmer* this court did not denigrate California's interest in protecting the state tort of emotional distress even though that tort was comparatively recent. Surely Indiana's interest is no less.

The Seventh Circuit in *Jackson* did not apply the analysis of this court in *Farmer*, in determining whether

the state tort was preempted. Unfortunately the *Jackson* court misunderstood *Farmer*. A full analysis of the *Jackson* case would reveal 1) RLA does not protect the underlying conduct; 2) the overriding state interest was conceded by Conrail as well as being set forth by the Indiana Supreme Court; 3) the RLA provides no authority to provide Plaintiff with damages; 4) there is, as outlined extensively above, a difference in focus of the state law and the RLA even though both forums might inquire into the same conduct; 5) there is little risk of a state retaliatory discharge claim interfering with the purposes and administration of the RLA since the claim only rises *in retaliation for pursuing FELA rights* and *in no other context*. Defendant raises a spectre of the courts being inundated with retaliatory discharge claims. The scope of this state tort under Indiana law is limited to discharge where it is proved that an employer terminated an employee because he or she pursued a claim for job-related injuries. Plaintiff does not seek nor will the allowance of the state's interest result in the opening of a Pandora's Box.

## III.

## DENIAL OF PETITIONER'S SEVENTH AMENDMENT RIGHT TO JURY TRIALS UNDER THE FELA AND FOR RETALIATION UNDER FEDERAL (FELA) AND STATE LAW.

The interference with petitioner's right to a jury trial under the FELA and the denial of his retaliatory claim under the FELA and Indiana law on a jurisdictional basis constitute a denial of his right to a jury trial under the Seventh Amendment to the U.S. Constitution. This Court in *Andrews v. Louisville & Nashville R.R. Co., supra* did not decide the Seventh Amendment issue because it was

not properly raised on the Petition for Certiorari. Mr. Justice Rehnquist writing for the majority indicated

> "The constitutional issue discussed in the dissent was not set forth as a 'question presented for review' in the petition for certiorari, and therefore our Rule 23(1)(c) precludes our consideration of it. 'We do not reach for constitutional questions not raised by the parties.' " 406 U.S. 325, 92 S.Ct. 1562 (1972) at 1065.

Thus under *Andrews* the entire question of a right to a jury trial where a discharge of any type occurs remains undetermined. Jackson has a right to a jury trial for his FELA personal injury claim which was interfered with, and he should have a right to a jury trial in his interference/retaliatory claim which the Seventh Circuit ruled he did not. It is of compelling constitutional importance that this Court protect his right to these jury trials.

The Court has long been concerned with and protective of claimants Seventh Amendment rights to a jury trial under the FELA.[3] *Urie v. Thompson*, 337 U.S. 163 (1949), *Cahill v. New York, N.H. & N.R. Co.*, 350 U.S. 898, 351 U.S. 183 (1955), *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500 (1956), *Moore v. Terminal R. Assn.*, 385 U.S. 31 (1966). Petitioner does not ask the court to review findings of fact below since those findings are conceded by the Defendant. Rather petitioner requests this court to protect his right and that of all workers under the FELA to a jury trial free of coercive intimidating and retaliatory tactics on the part of the railroad at any stage. There is no meaningful

[3] See particularly appendix to concurring opinion of Mr. Justice Douglas in *Harris v. Pennsylvania Ry. Co., supra.* In fact at one time the Court took over 50% of certiorari petitions on FELA to review fact findings of trial courts. *Supreme Court Certiorari Policy in Cases Arising Under the FELA*, 69 Harv. L. Rev. 1441 (1956) at 1445.

Seventh Amendment right when *three years after the incident* which gave rise to the FELA claim an employer informs the claimant (Jackson) that disciplinary charges are being brought against him arising out of that very incident. For a claimant to conduct his litigation in such a coercive and patently threatening milieu (disciplinary charges filed three years after incident and immediately after the FELA injury suit was filed) is to effectively deny him his right to a jury trial. The worker will be hesitant to seek recourse before a jury when he knows he can be disciplined for so doing. Thus the Seventh Amendment rights are taken away and the long line of decisions by this court upholding those rights are ignored as precedent.

Beyond the long recognized right to a jury trial under the FELA, petitioner also has Seventh Amendment right to a jury trial for the interference and retaliatory discharge under both the FELA and Indiana law. To effectuate the purposes of the FELA, any direct or implied right under that statute for enforcement must be given the same constitutional protection as the underlying right for injury compensation. In *Curtis v. Loether*, 415 U.S. 189 (1974) this court held that,

> "The Seventh Amendment does apply to actions enforcing statutory rights and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." *Id.* 194.

In *Curtis* this court found that the fair housing damage action (like the retaliatory discharge action before this court)

> ". . . sounds basically in tort—the statute merely defines a new legal duty, and authorizes the courts to compensate a Plaintiff . . . More important the relief sought here—*actual and punitive damages*—is

the traditional form of relief offered in the courts of law." *Id.* 195, 196 (emphasis added.)

The Seventh Circuit in *Jackson* relied on its own decision in *Essary v. Chicago & Northwestern Transportation Co.*, 618 F.2d 13, 17 (7th Cir. 1980), wherein it held that the procedures established under the RLA are a reasonable substitution for a jury trial. *Essary* did not arise in an FELA retaliation context and the court's reliance arises out of its erroneous premise throughout the *Jackson* opinion that his right not to be interfered with and terminated for filing an FELA grew out of the collective bargaining agreement. There is a right under the Seventh Amendment to a jury trial for a tort action which is not covered by, commented on, or any way referred to in the RLA. The implied and specific rights under the FELA existed at the time the RLA was enacted into law and still exist today. The tort of retaliatory discharge recognized by Indiana did not exist when the RLA became law and subsequent amendments have been silent as to retaliatory behavior on the part of the railroads. Thus where the FELA has long provided a right to a jury trial and that has long been held to be constitutionally mandated and where the states have provided a right to a jury trial, the Seventh Amendment right cannot be denied in a claim for retaliation for exercise of FELA rights.

## IV.

## DEFENDANT RAILROAD WAIVED JURISDICTIONAL DEFENSE UNDER CONCEPT OF PRIMARY JURISDICTION.

The Defendant also is estopped from raising a jurisdictional issue because it has in fact agreed with petitioner's contention that the retaliation claim was properly before the

district court. Specifically Defendant 1) complied with and did not appeal that portion of the district court's order requiring approximately ten days payment of wages to Jackson; 2) did not challenge the jurisdiction of the court to hear the Motion for Injunctive Relief for job reinstatement and took the benefit of the ruling denying said relief which was based on the availability of relief in damages; 3) never challenged the jurisdiction of the district court over the retaliation allegations by form of motion to dismiss; 4) stipulated to the court's jurisdiction over *all matters before the* court in the final pre-trial order filed with the court; 5) and admitted at trial that jurisdiction was not being attacked.

Only after verdict did the Defendant for the first time raise the jurisdiction defense. If the railroad in *Jackson* had claimed preemption by the RLA after the complaint was filed or during trial and the trial court had decided in favor of the railroad, then Jackson could have proceeded administratively, but in this case the railroad purposely waited until after the verdict before it raised preemption and lack of subject matter jurisdiction with the intent of destroying any administrative remedies Plaintiff may have had. The Defendant, in fact, waited for the result of a jury on the hope that its finding would favor the railroad. Not receiving the benefit of the jury's verdict the railroad raised a defense which it obviously must have known could have been raised earlier. (The initial FELA case was filed in 1980, Jackson was fired in 1981 and the case went to verdict in 1982.) The Defendant obviously wanted it both ways, winning before the jury on the retaliation or failing that, as it happened, raising the adverse jury verdict on appeal claiming the federal court was without jurisdiction to render its verdict. What the Defendant tells this Court is that the RLA and *An-*

*drews* apply only when the railroad loses at the trial court level.

The Seventh Circuit disregarded the decision of *DiFrischa v. New York Central Railroad Company*, 279 F.2d 141 (3rd Cir. 1960), wherein the court condemned similar type action of a railroad in regards to diversity jurisdiction. "A Defendant may not play fast and loose with the judicial machinery and deceive the Courts" *DiFrischa*, 279 F.2d at 144.

More importantly the *Jackson* court ignores its own statement that there are "clearly defined exceptions to the pervasive preemption of the RLA." As the dissent points out this is a contradiction in terms. A truly pervasive preemption would allow for no exceptions. Exceptions existing, the issue is not exclusive, subject matter jurisdiction but rather the extent of preemption. Thus even absent *DiFrischa* there is a waiver of a jurisdictional defense because the matter of extent of preemption is waived if not timely raised by a party. As this court indicated in *Colorado Anti-Discrimination Commission, et al. v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963), the RLA is clearly not all inclusive in the area of remedies. Thus it is incumbent upon the Defendant to raise those matters which are exclusively within the purview of the RLA. Having failed to do that prior to verdict the Defendant waived any such defense. Subject matter jurisdiction is not the issue. Rather as indicated in the dissent in *Jackson* the doctrine of primary jurisdiction applies and consequently the RLA/*Andrews* defenses were waived by the railroad.

## CONCLUSION

Wherefore, this petitioner prays for a Writ of Certiorari to review the judgment of the United States Court of Appeals which held that the District Court was without jurisdiction to hear a suit by an employee-petitioner against a railroad for the railroad's interference and retaliatory conduct with the petitioner's FELA personal injury suit.

Respectfully submitted,

LAWRENCE W. LECK
LAWRENCE W. LECK
AND ASSOCIATES, LTD.
111 West Washington Street
Chicago, Illinois 60602
(312) 641-2383

JOSEPH S. WITKOWSKI
JOSEPH S. WITKOWSKI
AND ASSOCIATES, P.C.
111 West Washington Street
Chicago, Illinois 60602
(312) 641-2383

*Attorneys for Petitioner*

# APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 82-2362, 82-2363

JUNIOR S. JACKSON,

*Plaintiff-Appellee, Cross-Appellant,*

*v.*

CONSOLIDATED RAIL CORPORATION,

*Defendant-Appellant, Cross-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80 C 4482—J. Sam Perry, *Senior Judge.*

ARGUED APRIL 15, 1983—DECIDED SEPTEMBER 1, 1983

Before PELL and POSNER, *Circuit Judges*, and BROWN, *Senior Circuit Judge.**

PELL, *Circuit Judge.* Consolidated Rail Corporation (Conrail) appeals from judgments entered below, pursuant to jury verdicts, awarding Junior S. Jackson (Jackson) compensatory damages in the amount of $13,500 for his claim under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (FELA), and $182,000 pursuant to his pendent claim of retaliatory discharge. Jackson urges on cross-appeal that a punitive damage award of

* Bailey Brown, Senior Circuit Judge for the Sixth Circuit, sitting by designation.

$1,260,000, relating to the retaliatory discharge claim, should be reinstated.

The principal issue on appeal is whether the provisions of the Railway Labor Act (RLA) providing for a scheme of administrative grievance procedures and remedies, 45 U.S.C. § 153 First, preempt the state tort action for retaliatory discharge upon which Jackson relied. If the RLA does preempt the state action, a related issue is whether the preemptive effect is to divest the district court of subject matter jurisdiction over Jackson's pendent claim, thereby making immaterial Conrail's delay until after trial in raising the preemption defense.

## I. FACTS

Jackson worked as a track maintenance foreman for Conrail. He was a member of the Brotherhood of Maintenance of Railway Employees (Union) and covered by the Union's collective bargaining agreement.

On August 22, 1980, Jackson filed a two-count complaint against his employer pursuant to the FELA. Jackson alleged that he suffered work-related injuries on or about February 3, 1978 and, as a result, was hospitalized for approximately ten days that month.[1]

On February 3, 1981, Jackson received a letter from Conrail. The letter advised him that a formal hearing would be held to determine whether he had violated the Railroad Safety Rules by, *inter alia*, failing to report his alleged injury of February 3, 1978. The hearing was held on February 25, 1981. A transcript of the hearing was sent to the Division Engineer so that he could determine what discipline was to be administered. Hammons, the

[1] Despite the parties' extensive briefing as to the nature of Jackson's claimed injuries, these facts are irrelevant to this appeal because Conrail has not challenged the jury verdict on the FELA action as being against the weight of the evidence. We therefore decline to recite the facts regarding these injuries.

Division Engineer, had learned previously of Jackson's 1978 injury because he had received a copy of Jackson's FELA complaint in November, 1980.[2] On April 20, 1981, Hammons issued a notice of discipline, discharging Jackson for failing to report immediately his February 3, 1978 injury to a supervisor as required by Railroad Safety Rule 3000(a) and for lifting beyond his physical capabilities.[3]

On April 10, 1981, Jackson had amended his claim to add a third count. He charged Conrail with job harassment and the intentional infliction of emotional distress.[4] Following his discharge, Jackson indicated that he would again amend his complaint to state a claim of retaliatory discharge and filed an emergency motion seeking to enjoin Conrail from discharging him in retaliation for filing the FELA claim. A hearing was held before Judge Marvin E. Aspen on May 4, 1981. Judge Aspen denied injunctive relief, noting that both Indiana and Illinois recognize a cause of action for retaliatory discharge and that Jackson could be adequately compensated if he succeeded in such an action.

On May 7, 1981, Jackson amended his complaint to add a fourth count alleging retaliatory discharge. He sought

---

[2] The copy of the complaint received by Hammons was accompanied by a letter from a Conrail claims agent suggesting that disciplinary action be instituted against Jackson.

[3] Conrail argues on appeal that Jackson was not "discharged" because he was entitled to a three-level appeal after Hammons' serving of the initial discharge notice on April 20, 1981. Jackson did not avail himself of this appeal process. In view of our disposition of the issues presented by this appeal, whether Jackson's discharge was final on April 20, 1981, is of no legal significance. We therefore will utilize the term "discharge" to describe the employment action taken against Jackson on that date.

[4] This claim was withdrawn on April 27, 1982, when Jackson filed a Third Amended Complaint to conform to the proof adduced at trial. The Third Amended Complaint also increased the requested punitive damages to $5,000,000.

$250,000 compensatory damages and $500,000 punitive damages. He asserted that the court had pendent jurisdiction over the claim. Conrail did not challenge this jurisdictional basis.

On April 19, 1982, a jury trial commenced before Senior Judge J. Sam Perry. On April 27, 1982, the jury returned its verdicts awarding the plaintiff $13,500 in compensatory damages on the FELA claim, $182,000 compensatory damages on the retaliatory discharge claim, and $1,260,000 punitive damages on that action. Conrail subsequently filed its post-trial motions urging, *inter alia*, that the district court lacked subject matter jurisdiction over Jackson's retaliatory discharge claim and that a new trial should be granted because of inflammatory remarks by Jackson's counsel during opening and closing argument. Prior to filing this motion, Conrail had not objected to the district court's exercise of pendent jurisdiction over the retaliatory discharge claim.

On July 28, 1982, the district court issued a memorandum order denying all Conrail's post-trial motions. The court upheld the jury verdicts except for the $1,260,000 punitive damage award which was set aside on the ground that willful, malicious, or oppressive conduct could only be asserted against Jackson's superior, who was not a party to the action, rather than against Conrail.

Conrail has appealed on the grounds that the district court lacked subject matter jurisdiction over the retaliatory discharge claim and that a new trial is required to determine the amount of compensatory damages because both compensatory awards were tainted by evidence and argument relevant, if at all, only to the question of punitive damages. Jackson urges on cross-appeal that the punitive damage award should be reinstated.

## II. SUBJECT MATTER JURISDICTION

Conrail contends that the scheme of administrative remedies and procedures mandated by 45 U.S.C. § 153

First preempts the power of the district court to entertain, pursuant to pendent jurisdiction, Jackson's claim of retaliatory discharge. Conrail's argument turns on three analytically distinct points: (1) Jackson's claim is a variety of wrongful discharge action and, under *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320 (1972) (*Andrews*), his exclusive remedy lay with the grievance procedures established pursuant to the collective bargaining agreement and with the National Railroad Adjustment Board (NRAB) created by 45 U.S.C. § 153 First;[5] (2) the preemption effected by the RLA divests the district court of subject matter jurisdiction over Jackson's pendent claim; and (3) because the court below lacked subject matter jurisdiction, Conrail cannot be estopped from raising the issue for the first time in its post-trial motions. Although there is some congruence in the discussion necessitated by the three prongs of Conrail's argument, we shall discuss each in turn insofar as possible.

*A. Preemptive Effect of the RLA*

*Andrews*, upon which Conrail relies, involved a railroad employee who was unable to work for a period after he was involved in an automobile accident. When Andrews believed that he was physically able to return to

---

[5] The portion of 45 U.S.C. § 153 First particularly relevant to both *Andrews* and the present case provides:

> The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, . . . shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the [NRAB] with a full statement of the facts and all supporting data bearing upon the disputes.

45 U.S.C. § 153 First (i).

work, the railroad refused to allow him to return. Andrews severed his connection with the railroad, characterized its refusal to grant him work as a wrongful discharge, and sought relief, in the form of damages for loss of past and future earnings, in the Georgia state court. After the railroad removed the case to federal court, both the district court and court of appeals held that Andrews' tort claim was barred because he had failed to exhaust his administrative remedies under the RLA.

The Supreme Court affirmed the dismissal of Andrews' suit. Two aspects of the *Andrews* opinion are particularly relevant to the present case. First, the Court reasoned that Andrews' claim was a minor dispute, subject to the arbitration remedy provided under the RLA, 45 U.S.C. § 153 First (i), because the collective bargaining agreement was necessarily the source of Andrews' claim that the discharge was wrongful. The Court noted that, absent the bargaining agreement, Andrews would have been subject to termination at the will of the railroad. 406 U.S. at 324. Second, the Court emphasized that exhaustion under the RLA does not mean merely that one must utilize administrative remedies before relitigating the merits of one's claim in an independent judicial proceeding. Rather, under the RLA, the federal administrative remedy is exclusive. *Id.* at 325.

Jackson urges on appeal that the district judge correctly found his claim to be outside the scope of *Andrews* and therefore cognizable as a pendent claim in his FELA suit. There is no question that Jackson's right not to be discharged at the will of Conrail grows out of the collective bargaining agreement. Similarly, there is no doubt that a "retaliatory discharge" is one variety of a "wrongful discharge" claim. Jackson's argument is that retaliatory discharge implicates certain rights that distinguish it sufficiently from the discharge in *Andrews* to place Jackson's claim outside the scope of the *Andrews* holding. Whether this is true is a question of first impression. The arguments and case law upon which Jackson relies are best grouped into two lines of analysis:

(1) that his retaliatory discharge claim vindicates a federal FELA right, and (2) that an exception to preemption is justified in this case by *Farmer v. United Brotherhood of Carpenters, Local 24*, 430 U.S. 290 (1977). We discuss each in turn.[6]

1. Vindication of Federal Right.

Jackson analogizes this case to those in which a claim based on a federal statute has been upheld, despite petitioner's failure to exhaust administrative remedies under the RLA or to obtain relief pursuant to those remedies. *E.g., Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981); *Johnson v. American Airlines, Inc.*, 487 F. Supp. 1343 (N.D. Tex. 1980). Jackson reasons that he had a federal statutory right to bring an FELA suit, 45 U.S.C. § 51, and that suffering discharge in retaliation for bringing such a suit has an impermissible impact on his federal right.

In *Johnson v. American Airlines, Inc.*, 487 F. Supp. 1343 (N.D. Tex. 1980), former commercial airline pilots challenged American's rule that made retirement of pilots mandatory at age sixty. The former pilots wanted to continue working for American as flight engineers. Flight engineers were not subject to the age sixty retirement rule. The district court held that the pilots' suit, based on the Age Discrimination in Employment Act, 29 U.S.C. § 623 (ADEA), was cognizable even though the plaintiffs had not exhausted the applicable remedies under the collective bargaining agreement or the RLA. The

---

[6] A third argument raised by Jackson requires only cursory consideration. Jackson contends that application of the *Andrews* preemption doctrine to the instant case would violate his Seventh Amendment right to a jury trial. This argument is not persuasive. In *Essary v. Chicago & Northwestern Transp. Co.*, 618 F.2d 13, 17 (7th Cir. 1980), this court held that the procedures established under the RLA are "a reasonable substitution for a jury trial" and would not "be deemed to violate plaintiff's Seventh Amendment rights."

court relied on the holding in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974), in which the Court stated that an arbitrator's resolution of a contractual claim is not necessarily dispositive of a statutory claim premised on Title VII. *Johnson*, 487 F. Supp. at 1345. The *Johnson* court noted that exhaustion of administrative remedies was not a condition precedent to maintaining an ADEA suit because the right not to suffer from age discrimination is a federal statutory right rather than a contractual right. *Id.* at 1346. *See also Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981) (wage claims based on Fair Labor Standards Act, 29 U.S.C. §§ 201-219, not barred by prior submission of grievances to contractual dispute resolution procedures); *Conrad v. Delta Airlines, Inc.*, 494 F.2d 914 (7th Cir. 1974) (distinguishing *Andrews* from Conrad's allegations that Delta discharged him, in violation of the express provisions of 45 U.S.C. § 152 Fourth, because of his union activities).

The present case is distinguishable from *Barrentine*, *Conrad*, and *Johnson* because neither the FELA, the RLA, nor any other federal statute specifically provides a right of action to one discharged under the circumstances alleged by Jackson. The question is whether the state tort action for retaliatory discharge, buttressed by the policies underlying the FELA, is sufficiently analogous to a federal statutory right to rebut the preemption of the RLA.

The case most relevant to resolving this issue is *Hendley v. Central of Georgia Railroad*, 609 F.2d 1146 (5th Cir. 1980), *cert. denied*, 449 U.S. 1093 (1981). Hendley brought suit to enjoin the railroad for which he worked from conducting a disciplinary hearing relating to his alleged disloyalty in assisting a fellow employee's FELA action against the railroad. Hendley relied on 45 U.S.C. § 60 which provides that it is a crime to discipline an employee for voluntarily furnishing information in connection with an FELA case. The district court in *Hendley* had ruled that his claim was a minor dispute, within the exclusive jurisdiction of the NRAB, because

the FELA case was already concluded and there was no possibility that relevant evidence would be suppressed through coercion by the railroad.

Several factors were relevant to the Fifth Circuit's holding that Hendley's claim was cognizable in federal court. The court noted that the case involved interpretation of a federal statute because it was necessary to determine whether 45 U.S.C. § 60 was applicable after the FELA action was concluded. The Fifth Circuit also analogized *Hendley* to *Brotherhood of Railroad Trainmen v. Central of Georgia Railway*, 305 F.2d 605 (5th Cir. 1962) (*Brotherhood*), in which the plaintiff had alleged that a disloyalty investigation by the railroad was instituted in order to discredit the union of which he was a representative. Because these allegations constituted, if proven, a violation of 45 U.S.C. § 152 Third, which prohibits coercion in the employees' choice of a representative, the Fifth Circuit had held that it had jurisdiction over the case. The *Hendley* court explicitly distinguished *Brotherhood* from a later Fifth Circuit disposition, *Brotherhood of Railroad Trainmen v. Southern Railway*, 393 F.2d 303 (5th Cir. 1968) (*Southern*), in which the plaintiff had relied on the general policy provisions of the RLA. The *Southern* court had held that jurisdiction could not be premised on such a general policy statement. *Hendley*, 609 F.2d at 1152 n.4.

The *Hendley* decision therefore recognizes an exception to preemption only if the suit is premised on a specific federal statutory section. It distinguishes such a claim from one in which the allegations constitute, if proven, only a violation of the policy underlying a federal statute. This distinction, recognized in *Hendley*, strongly suggests that the statutory procedures and remedies of the RLA are *not* rebutted in Jackson's case.

There is admittedly a superficial appeal to reasoning that the FELA, particularly those sections stating the right to sue, 45 U.S.C. § 51, and the prohibition against coercing an employee not to volunteer information relative to a fellow employee's FELA action, *id.* § 60,

prohibits an employer from discharging an employee in retaliation for filing an FELA action. Such a statute has not, however, been enacted by Congress.

In a case like this involving a railway worker subject to the RLA, yet entitled to rely upon the FELA, there is a tension between the two federal statutes. In such a context, a court must be particularly reluctant to elevate an FELA policy to the status of a federal right. Such caution is illustrated by *Bay v. Western Pacific Railroad*, 595 F.2d 514 (9th Cir. 1979), in which the court held that the language of 45 U.S.C. § 55, which, *inter alia*, declares "void" any "device" utilized by a common carrier to exempt itself from FELA liability, provides no private cause of action for an employee allegedly discharged in retaliation for filing an FELA action. That Jackson's claim is separately grounded in a state cause of action is immaterial because it is only federal statutory rights that have been held, under cases such as *Barrentine*, *Hendley*, *Conrad*, and *Johnson*, to rebut the preemption of the RLA. *See De La Rosa Sanchez v. Eastern Airlines, Inc.*, 574 F.2d 29 (1st Cir. 1978) (holding pension claim based on law of Puerto Rico subject to exclusive jurisdiction of the RLA despite alleged federal interest, embodied in the Employee Retirement Income Security Act of 1974, in fulfillment of pension obligations). We therefore concur with the distinction recognized by the *Hendley* court between cases premised on a federal statutory provision and those premised on a federal policy and hold that the policies underlying the FELA do not overcome the RLA mandate that Jackson's exclusive remedy lay with administrative grievance procedures.[7]

---

[7] Jackson has also urged in support of his position the Fifth Circuit disposition in *Smith v. Atlas Off-Shore Boat Serv., Inc.*, 653 F.2d 1057 (5th Cir. 1981). In *Atlas*, the plaintiff alleged that he was discharged as a seaman in retaliation for filing a personal injury claim pursuant to the Jones Act, 46 U.S.C. § 688, against his employer. The Fifth Circuit recognized Smith's action for retaliatory discharge as a "maritime tort." *Id.* at 1063.

(Footnote continued on following page)

2. *Farmer* Exception to Preemption.

The second argument urged by Jackson is that the "outrageous" conduct of Conrail requires recognition of an exception to the preemption doctrine in this case as it did in cases such as *Farmer v. Brotherhood of Carpenters, Local 25*, 430 U.S. 290 (1977) (*Farmer*); and *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978) (*Sears*). In both *Farmer* and *Sears*, the Supreme Court held that state claims were cognizable because they were not preempted by the federal labor laws.

In *Farmer*, the Court held that a California state court could exercise jurisdiction over the claim of a local union officer alleging intentional infliction of emotional distress. Hill, the petitioner's decedent, had alleged that, as a result of disagreement with other union officials, he was subjected to a campaign of ridicule and personal abuse and was discriminated against by the union hiring hall. After reviewing exceptions to the preemption doctrine recognized in earlier cases, *Farmer*, 430 U.S. at 295-97, the Court stated that one must determine the scope of the general preemption rule "by examining the state interests in regulating the conduct in question and the potential for interference with the federal regulatory scheme." *Id.* at 297.

In applying this test to Hill's claim, the Court first noted that the state had a substantial interest in protecting its citizens from the alleged outrageous conduct. *Id.* at 302. The Court recognized that, because the abusive conduct was intertwined with allegations of hiring hall discrimination, there was some potential that Hill's state

---

[7] *continued*

*Smith* is distinguishable from Jackson's case in several respects, the two most pertinent of which are that Smith was an at-will employee and, absent recognition of the maritime tort, had no forum whatsoever in which to press his grievance and that the preemptive effect of the RLA was not at issue in *Smith*.

claim would touch on areas generally within the exclusive jurisdiction of the National Labor Relations Board (NLRB). This potential interference did not overcome the state's interest, however, because resolution of the state tort suit turned on whether the union's actions had caused Hill severe emotional distress whereas the focus of an unfair labor practice inquiry would have been on whether the union's conduct discriminated against Hill in terms of employment opportunities. As a result, the tort action could be resolved "without reference to any accommodation of the special interests of unions and members in the hiring hall context." *Id.* at 305.

Similarly, in *Sears*, the Court held that Sears could rely on state trespass laws in seeking an injunction against union picketing on its private property. As in *Farmer*, the primary focus of the *Sears* Court was on whether recognition of the state trespass law would interfere with the federal regulatory scheme. The Court stated:

> The critical inquiry, therefore, is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to (as in *Garner*) or different from (as in *Farmer*) that which could have been, but was not, presented to the Labor Board.

*Id.* at 197. Applying this test to the facts presented in *Sears*, the Court found that the focus of the state trespass proceeding would be on *where* the picketing occurred—private property—whereas the focus of an unfair labor practice proceeding would have been on the objective of the picketing. *Id.* at 198.[8]

---

[8] The *Sears* Court also found relevant that Sears could not, on its own initiative, obtain an NLRB ruling regarding the picketing. The issue could be put before the NLRB only if the *union* alleged that Sears was violating its protected rights. 436 U.S. at 201. State court was the only tribunal to which Sears could turn to obtain an orderly resolution of the dispute. *Id.* at 202.

*Sears* and *Farmer* both raised questions of preemption under the National Labor Relations Act, 29 U.S.C. §§ 151-166 (NLRA), rather than under the RLA. Although this does not mean that the test articulated in *Farmer* and refined in *Sears* is inapplicable to the preemption issue in the present case, the difference between the impact of the NLRA and the RLA has significance. The focus of the NLRA is on specific conduct that Congress has deemed subject to either prohibition or protection, 29 U.S.C. §§ 157-158. Often, as illustrated by *Sears*, it is the objective of certain conduct, rather than the mere exercise thereof, that is relevant to determining whether actions are protected or prohibited by the NLRA. In contrast, the RLA has made *any* grievance arising out of the collective bargaining agreement subject to the exclusive arbitral remedies contained in that Act. 45 U.S.C. § 153 First (i). It follows from this difference that a state claim is more likely to impinge on an area of exclusive administrative jurisdiction under the RLA than under the NLRA.[9]

The lower court cases that have applied the *Farmer* test in the RLA context illustrate this result. For instance, in *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir. 1978), *cert. denied*, 439 U.S. 930, the plaintiff sued the defendant railroad and officers thereof in state court, alleging intentional infliction of emotional distress. The gravamen of Magnuson's complaint was

---

[9] In a case decided before *Farmer* and *Sears*, *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963), the Court held that neither the RLA nor any other federal statute precluded a claim, pursuant to the Colorado Anti-Discrimination Act of 1957, alleging that Continental refused to hire a job applicant solely because of his race. The Court found that no provision of the RLA addressed racial discrimination in hiring. 372 U.S. at 724. The *Colorado Anti-Discrimination* case illustrates a mode of analysis consistent with *Farmer* and *Sears* and demonstrates that not every state dispute involving a carrier subject to the RLA is preempted by that statute.

that his discharge, following a head-on collision between two freight trains, was part of a conspiracy to cover up the railroad's own negligence which was responsible for the accident. After removal to the federal court, the district judge dismissed Magnuson's complaint on the ground that it was subject to the exclusive jurisdiction of the dispute resolution processes established by the RLA. *Id.* at 1368.

The Ninth Circuit affirmed the dismissal. In distinguishing *Farmer*, upon which Magnuson relied, the majority stated: "Unlike *Farmer*, this action is based on a matrix of facts which are inextricably intertwined with the collective bargaining agreement and the R.L.A." *Id.* at 1369. The court noted that both the wrongful discharge aspects of Magnuson's claim and those pertaining to the propriety of the investigation and hearing had a "'not obviously insubstantial' relationship to the labor contract." *Id.* at 1369-70.

Similarly, in *Majors v. U.S. Air, Inc.*, 525 F. Supp. 853 (D. Md. 1981), the district court distinguished *Farmer* in concluding that jurisdiction over Majors' state claims for defamation and false imprisonment was precluded by the RLA. Majors' claims arose from an investigation conducted by the airline into whether he had stolen airline property. The district judge found that because his claim was based on some incident of the employment relationship, it was subject to the RLA. *Id.* at 857; *see also Carson v. Southern Railway*, 494 F. Supp. 1104, 1112 (D.S.C. 1979) (state defamation claim is "in essence and substance" an employment grievance solely within the jurisdiction of the NRAB); *Pandil v. Illinois Central Gulf Railroad*, 312 N.W.2d 139, 143 (Iowa App. 1981) (facts relevant to plaintiff's claim of wrongful denial of recall from furlough status "inextricably intertwined with the grievance procedures of the collective bargaining agreement" and therefore preempted by the RLA).

In applying *Farmer* to the instant case, we must examine "the state interest in regulating the conduct in question and the potential for interference with the

federal regulatory scheme." 430 U.S. at 297. First, we note that the district court found that Indiana recognized a tort action for retaliatory discharge in *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E. 2d 425 (1973).[10] The plaintiff in *Frampton* had been a terminable-at-will employee. She filed a claim pursuant to the Indiana Workmens' Compensation Act of 1929, Ind. Code §§ 22-3-2-1—22-3-6-3, when she learned of a thirty percent loss of use in her arm as the result of a work-related injury. She received a settlement for her injury. Approximately one month later, she was discharged without any reason being given. The Indiana Supreme Court upheld Frampton's cause of action, stating: '[W]hen an employee is discharged solely for exercising a statutorily conferred right an exception to the general rule [that, under ordinary circumstances, an employee-at-will may be discharged without cause] must be recognized." 297 N.E.2d at 428.

It is significant that Frampton was a terminable-at-will employee whereas Jackson was not. Although no Indiana court has addressed whether an employee subject to a union collective bargaining agreement can sue for retaliatory discharge, other courts have limited the action to employees-at-will, reasoning that the retaliatory discharge action provides the *only* means for such an employee to seek redress. *E.g., Cook v. Caterpillar Tractor Co.*, 85 Ill. App. 3d 402, 407 N.E.2d 95 (1980). *Contra, Wyatt v. Jewel Companies, Inc.*, 108 Ill. App. 3d 840, 439 N.E.2d 1053 (1982) (refusing to follow *Cook*).

Conrail has waived any challenge to Jackson's claim on the ground that it fails to state a cause of action. We

---

[10] The parties have not contested on appeal the applicability of Indiana law to Jackson's retaliatory discharge claim although portions of the record indicate some ambiguity as to whether Illinois or Indiana law was the basis of the claim. The difference is of little relevance, for our purposes, because it is unclear whether Jackson's claim would be cognizable under the law of either state. *See infra.*

need not resolve, therefore, whether the Indiana court would extend *Frampton* to provide Jackson, an employee who could seek relief pursuant to the collective bargaining agreement, a cause of action for retaliatory discharge. Recognizing that this issue is not clearly resolved is, however, a point of law that this court must consider in determining the state's interest in providing Jackson a judicial forum for his claim.

The second inquiry mandated by *Farmer* is the potential interference with the federal regulatory scheme. It is established under *Andrews* that a claim of wrongful discharge is subject exclusively to the administrative remedies established by the RLA. 406 U.S. at 325. Conrail defended against Jackson's retaliatory discharge claim by urging that he was discharged for cause: the violation of Railroad Safety Rules. The inquiry mandated by these two varying explanations of Jackson's dismissal must focus to a significant extent on the validity of Conrail's defense. As such, it is precisely the sort of inquiry required in any wrongful discharge action. Because Jackson's claim could not be resolved by examining only his FELA rights, it is abundantly clear that resolution of his suit impinges on those areas left, under the RLA, to exclusive administrative resolution. The claim raised by Jackson, pursuant to Indiana law, is identical to the claim he would have made, had he pursued the grievance through administrative channels, and therefore the potential interference with the federal regulatory interest is too great, under *Sears*, 436 U.S. at 197, to permit an exception to the preemption doctrine.

*B. Impact of the Preemption on the District Court's Subject Matter Jurisdiction*

Having determined that Jackson's claim is within the scope of *Andrews* and that his state tort remedy is accordingly preempted by the RLA, we turn to whether the effect of preemption in this case is to divest the district court of subject matter jurisdiction over Jackson's pendent claim.

In *Farmer*, the Supreme Court clarified, in the NLRA context, the relationship between preemption and jurisdiction:

> "[I]n referring to decisions holding state laws pre-empted by the NLRA, care must be taken to distinguish pre-emption based on federal protection of the conduct in question . . . from that based predominantly on the primary jurisdiction of the National Labor Relations Board . . . , although the two are often not easily separable." *Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383 n.19 (1969). The branch of the pre-emption doctrine most applicable to the instant case concerns the primary jurisdiction of the National Labor Relations Board.

430 U.S. at 295 n.5. The distinction made by the *Farmer* Court, considered together with the emphasis in *Andrews* on the *exclusivity* of the remedy provided, under the RLA, by the administrative procedures, compels the conclusion that the preemption at issue in this case relates to the subject matter jurisdiction of the court below. Numerous courts concur in this conclusion. For instance, in *Hendley v. Central of Georgia Railroad*, 609 F.2d 1146, 1150 (5th Cir. 1980), *cert. denied*, 449 U.S. 1093 (1981), the court observed that the NRAB has "exclusive jurisdiction over this dispute, unless 45 U.S.C. § 60 is found to override the statutory arbitration processes." In *De La Rosa Sanchez v. Eastern Airlines, Inc.*, 574 F.2d 29, 32 (1st Cir. 1978), the court stated: "No federal or state court has jurisdiction over the merits of any employment dispute subject to determination by a system board of adjustment." The Maryland district court has similarly observed that "this Court's jurisdiction is still preempted because of the threat of interference with a federal regulatory scheme." *Majors v. U.S. Air, Inc.*, 525 F. Supp. 853, 856 (D. Md. 1981); *see also Carson v. Southern Railway*, 494 F. Supp. 1104, 1112 (D.S.C. 1979) (dismissal for lack of subject matter jurisdiction).

Consistent with the foregoing authorities, we hold that the court below lacked subject matter jurisdiction to entertain Jackson's pendent claim.

*C. Estoppel Regarding Lack of Subject Matter Jurisdiction*

The question remains whether Conrail is estopped, by its previous consent to the exercise of jurisdiction by the district court over Jackson's pendent claim, from raising the preemption of subject matter jurisdiction for the first time in its post-trial motions and, now, on appeal.

The general rule is that subject matter jurisdiction may be challenged by a party or raised *sua sponte* by the court at any point in the proceedings. *E.g., American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 16-19 (1951); *Sadat v. Mertes*, 615 F.2d 1176, 1188 (7th Cir. 1980); Fed. R. Civ. P. 12(h)(3). The corollary to this rule is that "subject jurisdiction otherwise lacking cannot be conferred by consent, collusion, laches, waiver, or estoppel." *Sadat v. Mertes*, 615 F.2d 1176, 1188 (7th Cir. 1980).

Two of the cases upon which Jackson relies are inapposite because the courts determined that they *did* have subject matter jurisdiction over the claim. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982); *United States v. Edwards*, 23 F.2d 477 (8th Cir. 1927).

The final case relied upon by Jackson in support of his claim that Conrail is estopped from raising the issue of subject matter jurisdiction is *DiFrischia v. New York Central Railroad*, 279 F.2d 141 (3d Cir. 1960). In *DiFrischia*, the Third Circuit held that the defendant railroad was estopped from urging, twenty-three months after inception of the case, that diversity of citizenship between the parties, and therefore subject matter jurisdiction, was lacking.

Although the *DiFrischia* court does not elaborate at length as to the legal basis for its recognition of an exception to the general rule that the doctrine of estoppel is inapplicable to the issue of subject matter jurisdiction, the

Third Circuit's reference to *Young v. Handwork*, 179 F.2d 70 (7th Cir. 1949), *cert. denied*, 339 U.S. 949 (1950), suggests that the court viewed the determination of a party's citizenship as a question of fact and therefore distinct from the legal question whether subject matter jurisdiction was demonstrated. Estoppel was therefore applicable because it went to a question of fact rather than to the determination of jurisdiction. *See Young*, 179 F.2d at 73 ("'place of residence is a question of fact and not a question of law, and that question of fact has been settled in this court'" (quoting district judge in *Young*)).

*DiFrischia* is not persuasive support for Jackson's contention that Conrail is estopped from raising the preemptive effect of the RLA. The issue in *DiFrischia* involved diversity of citizenship, not preemption by federal law. Insofar as the rationale of *DiFrischia* turns on the distinction between the factual question of citizenship and the legal determination regarding jurisdiction, *DiFrischia* is clearly inapplicable to this case.

Further, this court has previously held, in a case involving diversity of citizenship, that it would not extend *DiFrischia* beyond its specific facts. *Sadat v. Mertes*, 615 F.2d 1176, 1188 (7th Cir. 1980). In so holding, the *Sadat* court was in accord with the weight of authority. *See* C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3522, at 50-52 & 52 n.25 (1975) (noting that the significance of *DiFrischia* as general precedent is "dubious," *id.* at 50, and that in more recent cases, the Third Circuit has either distinguished or ignored *DiFrischia*, *id.* at 52). Even if *DiFrischia* remains viable precedent, to apply that case's rule in the present situation, in which diversity jurisdiction is not at issue, would extend it far beyond its specific facts. Consistent with our conclusion in *Sadat*, 615 F.2d at 1188, we decline to do so.

While we in no way condone the failure of Conrail to raise earlier the dispositive question of whether subject matter jurisdiction over Jackson's pendent claim of retaliatory discharge is preempted by the RLA, this case is governed by the general rule that the question of

jurisdiction may be raised at any point in the proceedings. *Id.* For that reason, Conrail is not estopped from raising the jurisdictional issue for the first time in its post-trial motions before the district court.

## III. REMAINING ISSUES RAISED BY THE PARTIES

In light of our conclusion that the district court lacked subject matter jurisdiction over Jackson's retaliatory discharge claim, that claim must be dismissed and the judgment of compensatory damages awarded pursuant to that claim vacated. Our resolution of the jurisdictional question necessarily precludes Jackson's assertion on cross-appeal that the punitive damage award pursuant to the retaliatory discharge claim should be reinstated.

The only remaining issue therefore is whether the compensatory damage award of $13,500 pursuant to Jackson's FELA claim must be vacated and a new trial on damages granted. Conrail claims that the award was "tainted" by counsel's argument and evidence appropriate, if at all, only to the question of punitive damages.

The evidence and argument of which Conrail complains pertains to Conrail's net worth, the number of persons in Jackson's family, impliedly dependent upon him for support, and counsel's characterization of the case as an opportunity for the jury to send a message in favor of all working men to corporations throughout the country.

Conrail's argument is untenable because we find no indication that the FELA compensatory damage award was tainted. It is significant that the damages awarded Jackson on the FELA claim, $13,500 after a ten percent reduction for Jackson's contributory negligence, is less than eight percent of the compensatory damages awarded on the retaliatory discharge claim. Even more striking, it is just over *one percent* of the punitive damages awarded Jackson on the retaliatory discharge claim. These comparisons compel the conclusion that the jury

properly considered the FELA claim wholly separate and apart from the retaliatory discharge claim for the purpose of setting a damage figure and therefore no tainting occurred.

If any error did occur below pertaining to the admission of evidence or the tolerance of impermissible argument, a question that we do not decide, the error was harmless. The compensatory damage award of $13,500 in favor of Jackson on his FELA claim will not be disturbed on appeal.

## CONCLUSION

A federal interest embodied in the policies, but not the specific statutory provisions, of the FELA is insufficient to rebut the persuasive preemption of the RLA over Jackson's retaliatory discharge claim. Similarly, *Farmer v. Brotherhood of Carpenters, Local 25*, 430 U.S. 290 (1977), does not support recognition of an "exception" to the preemption doctrine in this case because resolution of Jackson's claim requires consideration of the same issues that Jackson would have raised before an administrative tribunal had he pursued the grievance procedures of the collective bargaining agreement and the RLA.[11]

---

[11] While we respect the prose style and the innovative ability of our brother Posner, in his dissent, we are unable to agree with the underlying premises on which he rests his approach.

We disagree with his conclusion that the case law is in disarray and, therefore, ripe for innovation. The case law, in fact, recognizes two clearly defined exceptions to the pervasive preemption of the RLA. *See* Sections II(A)(1) and (2), *supra*. It is interpretation of the second exception, illustrated by *Farmer v. Brotherhood of Carpenters, Local 24*, 430 U.S. 290 (1977), and its progeny, that is the major point of disagreement between us and Judge Posner. While we construe *Farmer* as precluding district court jurisdiction over an employee's suit if the facts relevant to that suit would also be critical to disposition of an administrative proceeding under the NLRA or RLA, the dissent would abrogate the rule of exclusive jurisdiction and rely

(Footnote continued on following page)

The preemptive effect of the RLA is to divest the court below of subject matter jurisdiction and, consistent with the general rule that subject matter jurisdiction may be challenged at any point in the proceedings, Conrail is not estopped from raising that issue for the first time after the jury had returned its verdicts.

The jury award of compensatory damages for Jackson's FELA claim shows no evidence of "tainting" by the admission of improper evidence or argument.

This cause is remanded to the district court with instructions to vacate the judgment and award of compensatory damages in favor of Jackson on his retaliatory discharge claim and to dismiss that claim for lack of subject matter jurisdiction. The judgment in favor of Jackson on the FELA claim is affirmed. Each party shall bear its own costs on appeal. We express no view as to the allocation of costs reached by the judge below relative to the district court proceedings.

REVERSED IN PART; AFFIRMED IN PART.

---

[11] *continued*
instead on the concept of primary jurisdiction. Because, as Judge Posner notes, no case has discussed such an approach, no case has squarely rejected it. At least in spirit, however, it would appear inconsistent with the Ninth Circuit disposition in *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir. 1978), *cert. denied*, 439 U.S. 930.

In sum, the dissent would create new law, an approach that we find inappropriate in light of the relevant precedent.

POSNER, *Circuit Judge*, concurring in part and dissenting in part. The plaintiff, Jackson, a railroad worker, was injured on the job and sued the railroad (Conrail) under the Federal Employers' Liability Act, 45 U.S.C. §§ 51 *et seq.* He later amended his complaint to add a pendent claim that the railroad, in violation of his rights under Indiana tort law, had fired him after and because he filed his FELA suit. He obtained a judgment awarding him damages of $13,500 for violation of the FELA and another $182,000 on his pendent claim, and the railroad has appealed. I agree with my brethren that the FELA damage award must be affirmed and for the reasons they give, but I disagree that the Railway Labor Act deprived the district court of jurisdiction over Jackson's claim for retaliatory discharge.

There is another jurisdictional issue, though, and it requires, I believe, a remand to the district court. A pendent claim must arise from "a common nucleus of operative fact" with the main claim. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966); *Hargrave v. OKI Nursery, Inc.*, 646 F.2d 716, 719 (2d Cir. 1980). This formulation is metaphorical rather than functional but can be made functional by considering how best to give effect to both the policy behind pendent jurisdiction and the competing policies that limit its proper scope. The functional approach requires comparison of two harms: the harm to the state's interest in confining adjudication of state law issues to its own courts, if pendent jurisdiction is exercised; and the harm to the holder of a federal claim in having to bring two suits in order to get complete relief in federal court for the wrong done him by the defendant, if pendent jurisdiction is declined. Jackson's FELA claim is based on the facts of the accident. The pendent claim, added by amendment to his complaint more than three years after the accident, is based on the facts of his discharge—distinct facts, which arose long after the accident. Any factual overlap between the two claims is minimal. The judicial economy created by allowing Jackson to maintain his state claim as an adjunct to his federal claim is therefore also min-

mal, and seems clearly outweighed by the impairment of state autonomy if Jackson is allowed to litigate his state claim in federal court.

There is an alternative route, also with support in *Gibbs*, see 383 U.S. at 725, to the same destination. Since Article III of the Constitution does not authorize the federal courts to exercise pendent jurisdiction as such, Jackson's state law claim can be adjudicated in federal court as pendent to his federal claim only if the two claims can be said to constitute a single federal case. There is a sense in which Jackson's claim for retaliatory discharge is an offshoot of his FELA accident case, but they are no more the same case than a father and son are the same person.

Of course, if Jackson were alleging a federal rather than state tort, we could forget pendent jurisdiction. Though one might think that federal law would forbid retaliation against a railroad worker for exercising his rights under the FELA, a federal statute, probably it does not, see *Graf v. Elgin, Joliet & Eastern Ry.*, 697 F.2d 771, 775 (7th Cir. 1983), and in any event Jackson has not pleaded a federal tort and he may not plead one for the first time after appeal. There is also as it happens a good deal of doubt whether retaliatory discharge for exercising a *federal* right is tortious under Indiana law; but as my brethren point out, we must assume for purposes of this appeal that it is since the railroad failed to preserve the question for appeal.

But if Jackson and the railroad are citizens of different states, his state claim has an independent jurisdictional basis in 28 U.S.C. § 1332, the diversity statute, since the requirement that there be at least $10,000 in dispute is satisfied. The complaint alleges that Jackson is a citizen of Indiana and that Conrail is "organized as a railroad corporation engaged in interstate commerce" in Illinois. It is unlikely that this is meant to be an allegation that Conrail is incorporated in Illinois; but in any event, since some public utilities and common carriers incorporate in many states, it is possible (though I should think unlikely)

that Conrail is a corporate citizen of Indiana, which would defeat diversity. I am sure Conrail does not have its principal place of business in Indiana, which would also defeat diversity. See 28 U.S.C. § 1332(c).

So I would remand the case to determine whether Jackson's state law claim is within the diversity jurisdiction. Not only do my brethren proceed by a different route, holding that the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*, bars jurisdiction over Jackson's state law claim, but they do not discuss the question whether the claim is within either the pendent or diversity jurisdiction of the federal courts. Now one might think that it would make no difference why the federal courts lack jurisdiction over Jackson's claim, provided they do, and that the majority's approach is more economical than mine because it avoids the necessity of remanding. But I believe it does make a difference. If a case is not within the jurisdiction conferred on the federal courts by Article III, they have no power to decide whether Congress has withdrawn their jurisdiction over a particular claim; they must dismiss before reaching that issue. To illustrate, suppose I brought a suit in federal court against Conrail complaining about its treatment of Mr. Jackson—brought the suit in my capacity as a public-spirited citizen. Article III would bar the federal court from adjudicating my claim. I would lack the constitutionally required standing; there would be no case within the meaning of Article III. The court could not ignore the issue of standing, proceed to the merits, and dismiss the suit on the ground that the Railway Labor Act barred it. This case is no different.

I also disagree with by brethren's analysis of the effect of the Railway Labor Act on Jackson's claim. They have applied the doctrine of exclusive jurisdiction; they should have applied the doctrine of primary jurisdiction. The Railway Labor Act does give the arbitration panels established under the Act exclusive jurisdiction to decide disputes between railroads and their employees "growing out of grievances or out of

the interpretation or application of [collective bargaining] agreements . . . ." 45 U.S.C. § 153 First (i). This means that if as in *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320 (1972), a railroad worker complains that he has been fired, or refused reinstatement, in violation of the collective bargaining agreement between his union and the railroad, he must litigate his claim before the arbitration panels set up under the Railway Labor Act; he may not, simply by describing his grievance as wrongful discharge (or intentional infliction of emotional distress, see *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir. 1978)), get a state or federal court to determine his rights under the collective bargaining agreement. But Jackson claims to have been fired for exercising a statutory right, and such a claim is not a grievance founded on the collective bargaining agreement. (Although the statute refers to "grievances" and "interpretation or application of [collective bargaining] agreements" disjunctively, "grievance" means a dispute over the application of a collective bargaining agreement. See, e.g., *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30, 33 (1957).)

It is not a grievance because it would exist even if there were no collective bargaining agreement, unlike the situation in *Andrews*. There it was "conceded by all that the only source of petitioner's right not to be discharged, and therefore to treat an alleged discharge as a 'wrongful' one that entitles him to damages, is the collective-bargaining agreement between the employer and the union." 406 U.S. at 324. See also *de la Rosa Sanchez v. Eastern Airlines, Inc.*, 574 F.2d 29, 32-33 (1st Cir. 1978). The collective bargaining agreement in this case is no more the source of Jackson's cause of action than if he were suing Conrail for a battery committed against him by his supervisor. Although an employee might as in *Graf v. Elgin, Joliet & Eastern Ry., supra*, 697 F.2d at 774-75, complain that retaliatory discharge was a violation of the collective bargaining agreement, he need not in order to have a cause of action; retaliatory discharge, even if not forbidden by the agreement, may—

as Jackson claims and we must assume—be tortious under state law. Cf. *id.* at 781-82.

All this is not to say that the collective bargaining agreement is irrelevant to this case. But it is relevant if at all as a defense to rather than as the foundation of Jackson's claim. The railroad argues that it discharged Jackson not because he sued it under the FELA but because he violated work rules and that the collective bargaining agreement entitled it to fire him for such violations. Now if the railroad fired Jackson only because he sued it, it is immaterial that it could validly have fired him on another ground. But if it fired him both in retaliation and for violating work rules, and each reason would have resulted in his being fired even in the absence of the other, the retaliation did not injure him. He would have been fired anyway, so there was no "but for" causation and hence no tort, which presupposes injury. This assumes, however, that the collective bargaining agreement would have allowed the railroad to fire Jackson for violating work rules; and whether this assumption is correct depends on the interpretation of the agreement—a matter within the exclusive competence of the arbitration panels under the Railway Labor Act.

But it does not follow that because the interpretation of the collective bargaining agreement is outside the district court's jurisdiction, yet may be material to Jackson's tort claim, the district court lacked jurisdiction over that claim. It follows only that upon the railroad's timely request the district court would have been required by the doctrine of primary jurisdiction to stay the proceedings before it while the parties repaired to the arbitrators for a definitive interpretation of the collective bargaining agreement. (On the doctrine generally see *United States v. Western Pac. R.R.*, 352 U.S. 59 (1956); *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 68 (1970).) If the arbitrators decided that the railroad had fired Jackson in violation of the agreement, the district court proceeding could resume. If the arbitrators decided he was fired in full compliance with the agreement (implying not only that the agreement pro-

vided valid grounds for discharge but also that the railroad would have fired Jackson on those grounds even if he had never sued it), then he could not prove tort causation and this suit would have to be dismissed.

We noted recently that the doctrine of primary jurisdiction is applicable to proceedings in which an issue arises that is within the exclusive competence of the Railway Labor Act arbitrators, and that the application of the doctrine may—depending on legislative intent—be waivable by a party's failing to make a timely request for reference to the arbitrators. *In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, Nos. 80-2735, 82-1637, slip op. 11-12 (7th Cir. July 15, 1983). Neither the language nor the general scheme and background of the Railway Labor Act suggests that Congress would have wanted a court to dismiss a railroad worker's common law suit merely because the interpretation of a collective bargaining agreement might—not that it must—become material, when the railroad did not think enough of the point to ask the trial court to send the parties to the arbitrators. And if reference is waivable, it was waived here by the railroad's failure to ask the district court for such a reference.

Now in *Andrews*, it is true, even if the railroad had not objected to the employee's failure to seek redress before the arbitrators, the court would have had no jurisdiction over his claim. "[T]he notion that the grievance and arbitration procedures provided for minor disputes in the Railway Labor Act are optional, to be availed of as the employee or the carrier chooses, was never good history and is no longer good law." 406 U.S. at 322. But that is because the Act gives exclusive jurisdiction over disputes arising from a railroad collective bargaining agreement to the arbitrators. The present dispute does not arise from the collective bargaining agreement. It has an independent basis in tort law and is therefore outside the arbitrators' exclusive jurisdiction though aspects of it may be within their primary jurisdiction.

There are questions about the mechanics of primary jurisdiction in a case such as this—who should ask for the

reference (if the employee must go to the arbitrators before filing suit, then one would speak of "exhaustion of remedies" rather than of "primary jurisdiction," but these are essentially the same doctrines, see *City of Peoria v. General Electric Cablevision Corp.*, 690 F.2d 116, 121 (7th Cir. 1982), except for timing), what deadlines are applicable, whether an arbitration panel would accept a reference and if not who would bear the onus in the judicial proceeding of having failed to get the panel's views. The simplest solution would be to require the employee to process his complaint as a grievance first (i.e., to exhaust), but I am not prepared to say that this is the only permissible solution. My basic point is unaffected. In a case like the present, applying primary jurisdiction, or exhaustion of remedies in the sense of "merely requiring exhaustion of remedies in one forum before resorting to another," rather than of "mak[ing] the federal administrative remedy exclusive," as in *Andrews*, 406 U.S. at 325, would protect the arbitrators' exclusive competence to interpret collective bargaining agreements—their interpretation would not even be reviewable in the tort suit, but only by the distinct and limited procedure specified in the Railway Labor Act, cf. *Port of Boston Marine Terminal Ass'n, supra*, 400 U.S. at 69; *City of Peoria v. General Electric Cablevision Corp., supra*, 690 F.2d at 122. But it would do so without cutting down rights under state law any more than is necessary to protect that competence.

It puzzles me why we should go further and hold, as my brethren do in effect, that even if the arbitrators decide that the railroad had no contractual right to fire the employee, the employee may not maintain a tort action for retaliatory discharge. It is a grave matter for an employer to fire an employee for exercising a legal right. True, if he does this he may well be violating the collective bargaining agreement and the arbitrators can order the employee reinstated with back pay. But it would be surprising if compulsory arbitration of contract disputes was intended to wipe out the employee's common law rights other than his right to enforce the very contracts

that are subject to the scheme of compulsory arbitration. It might be different if Congress had established an administrative agency to police tort or tort-like conduct in railroad employment, but it has not; it has contented itself with requiring arbitration of contract disputes.

But maybe this takes too narrow a view of Congress's objectives in the Railway Labor Act; maybe it can be argued that Congress wanted to exclude the courts, state and federal, from any involvement in the railroad employment relationship beyond the very limited review function that it assigned the federal courts in connection with arbitration awards. There may be something to this argument, but I am sure no one takes it literally. No one would argue that if Jackson's supervisor had punched him in the nose for refusing to obey an order Jackson could have prosecuted a complaint against the railroad only as a grievance before one of the arbitration panels, and not as a complaint in court for common law battery. I do not see why a case where a railroad intimidates (though not physically) workers who file accident claims should be treated differently.

My brethren's review of precedent shows that the case law on the displacement of tort law by the Railway Labor Act is in disarray; the suggestion that there are "clearly defined exceptions to the pervasive preemption of the RLA" is a contradiction in terms—if the preemption were truly pervasive, there would be no exceptions. And their further effort to bring that body of case law into phase with the cases dealing with the displacement of tort law by the National Labor Relations Act, 29 U.S.C. §§ 152 *et seq.*, such as *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290 (1977), can only be described as heroic. A possible way out of the mire is to recast the problem as one of primary jurisdiction, a doctrine that applied to these cases (I confine my attention to the Railway Labor Act) would enable federal interests to be fully served with minimum damage to state interests. True, it would not eliminate all difficult questions. *Andrews* forbids the states to provide common law remedies for breach of a railroad collective bargaining contract simply by calling

the breach a tort, and sometimes it will be hard to decide whether a cause of action is based on the contract or on a right (conferred by state law) that is more than just a right to have a contract honored. Here, however, as in the defamation and false-imprisonment cases that the majority opinion cites, the cause of action clearly has an independent source in state tort law; it is not just a case of breach of contract by another name, as in *Andrews* and (less clearly) *Magnuson*. Although it would be reckless to suggest that primary jurisdiction is the secret key to reconciling all the cases reviewed in the majority opinion —though the majority I notice quotes the Supreme Court's description of *Farmer* as a primary-jurisdiction case, see 430 U.S. at 295 n. 5—no previous decision of this court, and no decision of the Supreme Court, prevents us from adopting the approach I have suggested. We are free to innovate, in an area where innovation would be fruitful.

To summarize, if the doctrine of pendent jurisdiction were applicable, the district court would in my view have jurisdiction over Jackson's claim of retaliatory discharge despite the Railway Labor Act. But as I said earlier this is not a proper case for pendent jurisdiction and we cannot be certain that Jackson's claim is within the diversity jurisdiction. We should remand, but I earnestly suggest not dismiss, that claim.

A true Copy:

Teste:

---

*Clerk of the United States Court of Appeals for the Seventh Circuit*

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUNIOR JACKSON,

*Plaintiff,*

No. 80 C 4482 *v.*

CONSOLIDATED RAIL CORPORATION,

*Defendant.*

### MEMORANDUM ORDER

This cause comes on upon defendant's Motion for relief from judgment and to dismiss for lack of subject matter jurisdiction, or in the alternative, motion to amend or alter the judgment, or in the alternative, motion to arrest judgment, or in the alternative, motion for judgment notwithstanding the verdict, or in the alternative, motion for a new trial, or for such other relief as the court may see fit to grant.

The court has read and considered the aforesaid motion and the memoranda of the respective parties and finds that said motion should be denied for the reasons hereinafter set forth and, further, for the reasons set forth in plaintiff's memorandum in opposition except that the verdict of the jury for punitive damages should be set aside for the reason that the jury abused its discretion and did not exercise it in that the defendant itself cannot be held responsible for the oppressive, malicious, and otherwise unfair treatment of the plaintiff which the evidence established.

The court has engaged in a great deal of research into the case law concerning the vexing question whether or not the court had jurisdiction over the retaliatory discharge claim in the complaint and has concluded that it had such jurisdiction. The court is of the opinion that in this particular milieu plaintiff's discharge was not a minor dispute such as was discussed in *Andrew v. Louisville & Nashville R.R. Co.*, 406 U.S. 320 (1972), but rather was an activity of the railroad even stronger in its coercive effect than the activity of a railroad which was held in *Hendley v. Central of Georgia R.R. Co.*, 609 F.2d 1146 (5th Cir. 1980), to be not a minor dispute and therefore not subject to the preemption doctrine of the Railway Labor Act. The court concludes that in the case at bar the railroad's activity in discharging plaintiff either was the result of, or at least had the effect of, a plan to coerce other employees from seeking statutory entitlements, and therefore rendered plaintiff's claim for the tort of retaliatory discharge amenable to this court's jurisdiction. In short, the court concludes that the Railway Labor Act does not preclude a District Court from hearing a claim against a railroad for the tort of retaliatory discharge.

The above conclusion comports also with the public policy of the State of Indiana, enunicated in *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973), that the employee-residents should not be subject to discharge for seeking statutorily-approved compensation for their injuries. Defendant has cited no authority, and the court has been able to find none, which supports defendant's assertion that the plaintiff would be unable to recover for rataliatory discharge under Indiana law (see supporting memorandum at 9). Defendant's citation of *Cook v. Caterpillar Tractor Co.*, 85 Ill. App. 3d 402 (1980) is of no help to defendant because it does not apply to Illinois courts.

The plaintiff began his employment with defendant's predecessor when he was only seventeen years old and with only a grade school education. He was a faithful, loyal and honest employee. The evidence revealed that

it was his honesty and loyalty to his employer, the defendant, that caused him to lose his job with the defendant. If defendant's motion should now be granted, and the plaintiff should be compelled to pursue his administrative remedy, the defendant would be quick to raise the defense that the statute of limitations has run and that the plaintiff has no remedy left for his claim of lawful discharge.

The court has before it the case of an unlearned man who had no knowledge about his legal rights, or about legal procedure, who was not given equal protection under the law by defendant when defendant discharged him through an act of plaintiff's superior. The superior retaliated against him for plaintiff's having reported a kickback scheme involving his superior and certain employees whom plaintiff's superior had placed on defendant's payroll and who received pay for periods of time they did not work.

The evidence revealed that when plaintiff wrote anonymous letters to the defendant the letters were sent by defendant to plaintiff's superior. Plaintiff's superior suspected plaintiff had written the letters. The superior then called the plaintiff into his office and forced him to confess that he had written the letters and to make a retraction. Plaintiff's superior was looking for an excuse to discharge the plaintiff, whom he considered to be a troublemaker. When plaintiff wrote the superior and requested a later date for the hearing on the trumped-up charge against him,—for the reason that he could not get his union representative to be present on the date set for the hearing,—his superior proceeded with the hearing in his absence without notifying the plaintiff that no continuance would be granted.

The discharge of the plaintiff under all of the circumstances was more than a wrongful discharge. It was a common law tort which could not be preempted by the Railway Labor Act or by any other act of Congress or the Indiana Legislature. Therefore, this court has pendent jurisdiction. The plaintiff's right to equal protection under

the law was violated by the defendant in this case, all contrary to both the Fifth and Fourteenth Amendments. The court has an obligation to fashion a remedy when any of the civil rights of the plaintiff have been violated. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

Judgment should be entered upon the verdict of the jury assessing plaintiff's compensatory damages in the sum of $182,000 and judgment should be entered on the claim filed under the Federal Employers Liability Act for recoverable damages in the sum of $13,500. However, punitive damages cannot be assessed against defendant itself in this case for willful, malicious or oppressive conduct cannot be imputed to the defendant. Such conduct should be ascribed to plaintiff's superior but he is not a party to this suit.

The plaintiff also has filed a petition and an amended petition for his costs arising out of this action and the court has considered the same, together with the memoranda of the parties concerning same, and finds said amended petition for costs should be granted to the extent of the expenses incurred to date on behalf of plaintiff in the sum of $3,464.91.

In view of the foregoing, it is ORDERED and ADJUDGED as follows:

1. Judgment is entered upon the verdict of the jury reading "WE, the Jury, find for the plaintiff and against the defendant on the issue of retaliatory discharge and assess plaintiff's compensatory damages in the sum of $182,000."

2. Judgment is entered in favor of the plaintiff and against the defendant on the claim filed under the Federal Employers Liability Act for recoverable damages in the sum of $13,500.

3. The total judgment in favor of plaintiff and against defendant in this case is therefore $195,500. In Addition,

plaintiff shall also have judgment for his costs herein in the sum of $3,464.91.

4. The verdict of the jury finding for the plaintiff and against the defendant on the issue of retaliatory discharge and assessing punitive damages against the defendant in the sum of $1,260,000 is set aside and held for naught.

ENTER:

/s/ J. S. Perry
District Judge

Dated: July 28, 1982

## APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUNIOR S. JACKSON,

*Plaintiff,*

No. 80 C 4482 *v.*

CONSOLIDATED RAIL CORPORATION, a corporation,

*Defendant.*

### MEMORANDUM OPINION AND ORDER

MARVIN E. ASPEN, *District Judge*:

Plaintiff Junior Jackson ("Jackson") originally filed this action on August 21, 1980, against his employer, defendant Consolidated Rail Corporation ("ConRail"), under the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.*, seeking damages as a result of an injury Jackson allegedly suffered on February 3, 1978, during the course of his employment as a trackman at ConRail's Wabash, Indiana, railroad yard. After he filed this suit, Jackson was charged with violating company safety rules in connection with his alleged injury, which rules provided that an employee should not attempt to lift heavy or unwieldy objects without assistance and that an employee should notify his immediate supervisor of an injury at the earliest opportunity. Jackson was discharged for his misconduct on April

20, 1981.[1] This case is presently before the Court on Jackson's motion for a preliminary injunction compelling reinstatement to his position at ConRail on the ground that he was wrongfully discharged.[2]

Several states, including Indiana and Illinois, recognize a cause of action for wrongful or retaliatory discharge sounding in tort when an employee is discharged in retaliation for exercising his legal rights. *Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 384 N.E.2d 353 (1978); *Sventko v. Kruger Co.*, 69 Mich.App. 644, 245 N.W.2d 151 (1976); *Frampton v. Central Indiana Gas Company*, 260 Ind. 249, 297 N.E.2d 425 (1973). However, Jackson has not directed the Court to any cases in which a court ordered a wrongfully discharged employee reinstated pending resolution of his legal action in the absence of particularly exigent or compelling circumstances. Indeed, the Supreme Court as well as the United States Court of Appeals for the Seventh Circuit have noted "the traditional unwillingness of courts of equity to enforce contracts for personal service either at the behest of the employer or of the employee." *Sampson v. Murray*, 415 U.S. 61, 83 (1974); *Ekanem v. Health & Hospital Corporation of Marion County*, 589 F.2d 316, 321 (7th Cir. 1978).

Nevertheless, in order to obtain preliminary injunctive relief, a plaintiff seeking reinstatment in an employment case, just like any other plaintiff, must establish a reasonable likelihood of success on the merits, irreparable in-

---

[1] The real reason for his discharge is disputed. ConRail contends that Jackson was discharged for violation of company safety rules. Jackson maintains that he was discharged because he filed suit against ConRail under the FELA.

[2] This Court issued a temporary restraining order on April 22, 1981, ordering that ConRail reinstate Jackson or pay him his regular salary pending a hearing on his motion for injunctive relief. Jackson has not yet filed an amended complaint alleging retaliatory discharge; however, the parties have treated the amended complaint as having been filed for the purpose of this motion for injunctive relief.

jury if the injunction is not granted, the lack of serious adverse impact on others if the injunction is granted, and that the injunction would be in the public interest. *Ekanem v. Health & Hospital Corporation of Marion County, supra*, 589 F.2d at 319; *Kolz v. Board of Education*, 576 F.2d 747, 748 (7th Cir. 1978); *Theodore v. Elmhurst College*, 421 F.Supp. 355, 356 (N.D. Ill. 1976). It is not necessary to discuss each of the four requirements at length, however, since Jackson has failed to show that he would be irreparably injured if the injunction does not issue.

Jackson argues that he will be irreparably injured because he will lose pay and seniority if he is not reinstated to his position at ConRail. However, it is clear that loss of income as well as more serious financial problems do not constitute sufficiently irreparable injury to support preliminary injunctive relief. *Sampson v. Murray, supra*, 415 U.S. at 88-92; *Theodore v. Elmhurst College, supra*, 421 F.Supp. at 357. If Jackson is successful on the merits of his claim for retaliatory discharge, he can be adequately compensated for his temporary loss of income with an award of back pay. Moreover, Jackson has not shown that he is unable to obtain other employment during the pendency of this action in order to supplement his income.

Accordingly, the motion for preliminary injunction is denied. The temporary restraining order issued April 21, 1981, and extended on May 1, 1981, is hereby dissolved. It is so ordered.

/s/ Marvin E. Aspen
Dated: 4/4/81 United States District Judge

No. 83-887

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

JUNIOR S. JACKSON,

*Petitioner,*

vs.

CONSOLIDATED RAIL CORPORATION,

*Respondent.*

## SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LAWRENCE W. LECK
LAWRENCE W. LECK
AND ASSOCIATES, LTD.
111 West Washington Street
Chicago, Illinois 60602
(312) 641-2383

JOSEPH S. WITKOWSKI
JOSEPH S. WITKOWSKI
AND ASSOCIATES, P.C.
111 West Washington Street
Chicago, Illinois 60602
(312) 641-2383

*Attorneys for Petitioner*

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

## TABLE OF CONTENTS

## LIST OF AUTHORITIES

*Cases*

In The

# Supreme Court of the United States

October Term, 1983

---

**JUNIOR S. JACKSON,**

*Petitioner,*

vs.

**CONSOLIDATED RAIL CORPORATION,**

*Respondent.*

---

## SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## ADDITIONAL REASONS FOR GRANTING THE WRIT

**THE WRIT OF CERTIORARI SHOULD BE ALLOWED BECAUSE THE EIGHTH CIRCUIT COURT OF APPEALS OPINION IN *LANDFRIED v. TERMINAL RAILROAD CO.*, INDICATES THE MAGNITUDE OF THE PRACTICE OF THE RAILROADS FIRING WORKERS FOR FILING FELA CLAIMS.**

**THIS COURT'S DECISION IN *SILKWOOD v. KERR-McGEE CORP.* ALLOWS THE STATE OF INDIANA TO PROTECT ITS CITIZENS THROUGH THE TORT OF RETALIATORY DISCHARGE.**

Plaintiff supplements its Petition for Writ of Certiorari by submitting to this Court the opinion of the Eighth Circuit Court of Appeals in *Landfried v. Terminal Railroad Co.*, 83-1160EM (which case was referenced at page 16 of the original Petition for Writ of Certiorari as having been argued but not decided). *Landfried* involved the termination of three railroad employees for the filing of FELA lawsuits and is further evidence of the magnitude of the problem and growing interference with congressionally given right of access to the courts of railroad employees. The *Landfried* court rejected *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 302 (1972) as a basis for denying the retaliatory discharge claim.

> "Andrews is, of course, distinguishable from the present case inasmuch as *Andrews was not discharged in retaliation for filing an FELA claim.* (Emphasis added) The Supreme Court has not yet ruled on the applicability of *Andrews* to claims of the kind Plaintiffs assert here, and the question is one of first impression in this circuit." *Landfried v. Terminal Railroad Co.*, 83-1160EM/Slip opinion at page 3

Thus *Andrews* is not dispositive of the interference/retaliatory issue which was new to the Eighth Circuit as well as to the Seventh Circuit in the *Jackson* case. It has been reported to Petitioner's counsel that Plaintiffs' attorney in *Landfried* will presently be filing a Petition for Writ of Certiorari with this Court.

Three additional new decisions indicate the scope of the problem and the availability of the tort of retaliatory discharge to the worker who is terminated. On December 6, 1983 the First Circuit Court of Appeals held that a railroad worker stated a cause of action for retaliatory discharge for the railroad's violation of public policy in terminating Plaintiff for his union organizing activities. *Stephanischen v. Merchants Despatch Transportation Corporation*, ..... F.2d ..... (1983), 83-1355, 1st Cir. decided December 6, 1983, 114 LRRM 3641.

The concept that the tort of retaliatory discharge is legally independent of a collective bargaining agreement was again recognized in a recent Illinois opinion, *Midgett v. Sackett-Chicago, Inc.*, 118 Ill.App. 3d 7, 454 N.E.2d 1092 (1983). Plaintiff Midgett was fired for filing a claim for injuries sustained on the job and the defense of exclusivity of the collective bargaining agreement was rejected because of the fact that a strong public policy i.e. the right to file a workmen's compensation claim was interfered with.

The Third Circuit Court of Appeals recently applied the Pennsylvania common law of retaliatory discharge (unlike the *Jackson* court which failed to apply the Indiana law of retaliatory discharge, when in fact Defendant waived any challenge to that law) in holding that interference with a recognized right protected by public policy gave rise to a tort action of retaliatory discharge. *Novosel v.*

*Nationwide Insurance Co.*, ..... F.2d ..... (1983), 83-5101, 3rd Cir. decided November 2, 1983, 114 LRRM 3105.

Finally as to the assertion of the state tort of retaliatory discharge, this Court's ruling of January 11, 1984 in *Silkwood v. Kerr-McGee Corp.*, 44 CCH S.Ct. Bull. 580/U.S. S.Ct. Slip opinion January 11, 1984, stands as authority for the proposition that a state is given a right to protect its citizens and provide remedies for violations of public policy which impact upon the citizen and ultimately on the social and economic fabric of that state. As the Court held in *Silkwood*:

> "Preemption should not be judged on the basis that the federal government has so completely occupied the field of safety that state remedies are foreclosed but on whether there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law." *Silkwood v. Kerr-McGee Corp.*, 44 CCH S.Ct. Bull. at page 598/U.S. S.Ct. Slip opinion at page 17.

In the present cause the Indiana state tort of retaliatory discharge neither conflicts with nor frustrates the Railway Labor Act or the FELA. In fact the state tort of retaliatory discharge implements the intention of Congress in making the FELA an effective and meaningful remedy for workers injured in the railroad industry.

The right Indiana gave Junior Jackson to actual and punitive damages for retaliatory discharge from his employment is consistent with the purposes of the FELA and this Court's recognition in reference to the FELA that:

> "Congress saw fit to enact a statute of the most general terms, thus leaving in large measure to the courts the duty of fashioning remedies for injured em-

UNITED STATES COURT OF APPEALS
FOR THE EIGHT CIRCUIT

---

No. 83-1160

---

Charles H. Landfried, Sr., James A. Rash, and William E. Jackson,

Appellants,

v.

Terminal Railroad Association of St. Louis, a Corporation,

Appellee.

---

Appeal from the United States District Court
for the Eastern District of Missouri

---

Submitted: September 15, 1983
Filed: November 22, 1983

---

Before LAY, Chief Judge, HENLEY, Senior Circuit Judge, and BOWMAN, Circuit Judge.

---

BOWMAN, Circuit Judge.

The district court granted defendant Terminal Railroad Association of St. Louis' motion to dismiss plaintiffs' Amended Complaint (the complaint) for failure to exhaust administrative remedies and failure to state a claim. Plaintiffs appeal from that decision. We affirm.

Plaintiffs are former employees of defendant. They allege that defendant discharged them in retaliation for their bringing actions against defendant under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (FELA). They contend that this kind of discharge is actionable as a matter of federal law and policy and that the federal courts have jurisdiction to adjudicate their claims. The sole question presented in this appeal is whether plaintiffs' claims are judicially cognizable in an action filed in a federal district court, or whether, as the district court held, such claims are within the exclusive jurisdiction of the National Railroad Adjustment Board (the Adjustment Board).

Two federal statutes are involved in this case. The FELA confers upon railroad employees a right to recover from their employers for injuries suffered as a result of any negligence, however slight, by the employer. *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957). Separate from the FELA is the Railway Labor Act, 45 U.S.C. §§ 151-188 (RLA), the purpose of which is to promote stability in labor-management relations in the national railroad industry. *Union Pacific Railroad Co. v. Sheehan*, 439 U.S. 89, 94 (1978).

Among the provisions of the RLA for the resolution of disputes between railroads and their employees is 45 U.S.C. § 153 First (i), which provides as follows:

> The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

In construing this provision of the RLA, the Supreme Court has held that disputes between an employee and a railroad concerning the interpretation of the terms of a collective bargaining agreement are within the exclusive jurisdiction of the Adjustment Board. *Andrews v. Louisville and Nashville Railroad*, 406 U.S. 320 (1972). *See Raus v. Brotherhood Railway Carmen of the United States and Canada*, 663 F.2d 791 (8th Cir. 1981). The Adjustment Board has exclusive jurisdiction even where the employee complains of a wrongful discharge by the railroad. *Andrews, supra.*

The plaintiff in *Andrews* was a railroad employee who was unable to work for some time after he was involved in an automobile accident. When Andrews felt that he was able to resume work, the railroad refused to allow him to return. Andrews severed his connection with the railroad. treated its refusal to allow him to work as a wrongful discharge, and sought damages in a Georgia state court. After the railroad removed the case to the federal court, both the district court and the court of appeals held that Andrew's wrongful discharge claim was barred because he had vailed to exhaust his administrative remedies under the RLA. The Supreme Court affirmed the dismissal of Andrews' suit, emphasizing that the only source of his right not to be discharged, and therefore to treat the alleged discharge as wrongful, was the collective bargaining agreement between the employer and the union. Reasoning that Andrews' claim, and the railroad's disallowance of it, stemmed from differing interpretations of the collective bargaining agreement, the Court held that such discharge grievances are subject to compulsory arbitration under the RLA.

*Andrews* is, of course, distinguishable from the present case inasmuch as Andrews was not discharged in retaliation for filing a FELA claim. The Supreme Court has not yet ruled on the applicability of *Andrews* to claims of the kind plaintiffs assert here, and the question is one of first impression in this circuit. We note, however, that the complaint includes allegations that in discharging plaintiffs the

railroad failed to comply with the requirements of the collective bargaining agreement entered into between the railroad and plaintiffs' respective unions.[1] Defendant, on the other hand, contends that plaintiffs were discharged for having violated various safety and work rules, all arguably in a manner consistent with the agreements between defendant and the unions of which plaintiffs were members. Thus, it appears that resolution of plaintiffs' claims will depend at least in part on interpretation of the applicable collective bargaining agreements. Under *Andrews* such claims are subject to the RLA's provisions for the processing of grievances and the federal courts are barred from adjudicating them. *See Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978).

Our conclusion that plaintiffs are barred from litigating their claims in federal court is consistent with recent decisions in the Seventh and Ninth Circuits, which appear to be the only other circuits that have ruled on the justiciability of retaliatory discharge claims of the kind here presented. *See Jackson v. Consolidated Rail Corporation*, Nos. 82-2362, 82-2363 (7th Cir. Sept. 1, 1983); *Bay v. Western Pacific Railroad Company*, 595 F.2d 514 (9th Cir. 1979).

We might reach a different conclusion if, as in *Hendley v. Central of Georgia Railroad Co.*, 609 F.2d 1146 (5th Cir. 1980), *cert. denied*, 449 U.S. 1093 (1981), plaintiffs could show that their discharge constitutes the violation of a specific federal statutory section. But we do not need to decide whether we would adopt the view taken by the Fifth Circuit in *Hendley*, for the fact is that Congress has not enacted a statute prohibiting an employer from discharging an employee in retaliation for filing a FELA action. Given the availability to plaintiffs of recourse to the arbitration procedure established under the RLA,

---

[1] *See* Designated Record at 1-29. These allegations are found in paragraph 7 of each count of the complaint.

there is little reason for a federal court to imply a right of action where Congress has not acted to create one. Although the language of 45 U.S.C. § 55 declares "void" any "device" utilized by a common carrier to exempt itself from FELA liability, that section does not provide a cause of action for an employee discharged in retaliation for filing a FELA action. *See Bay v. Western Pacific Railroad, supra.* In *Bay*, the court traced the legislative history of § 55 and concluded that Congress' purpose was to void contracts discharging the common carrier from liability for personal injuries suffered by its employees. "[Section 55] was not intended to afford a cause of action, separate from that for recovery of damages for injury under FELA, against an employer that engages in a device to exempt itself from FELA liability." *Id.* at 516 (footnote omitted).

Plaintiffs urge in support of their position the decision in *Smith v. Atlas Off-Shore Boat Service, Inc.*, 653 F.2d 1057 (5th Cir. 1981). In *Smith*, the plaintiff alleged that he was discharged as a seaman in retaliation for filing a personal injury claim against his employer pursuant to the Jones Act, 46 U.S.C. § 688. The Fifth Circuit recognized Smith's action for retaliatory discharge as a "maritime tort." *Id.* at 1063. *Smith*, however, is clearly distinguishable from the present case in at least two significant ways. First, Smith was an at-will employee; absent recognition of the maritime tort, he would have had no forum in which to press his claim. Second, in *Smith* the preclusive effect of the RLA was not at issue.

Each of the plaintiffs is processing his grievance through the appropriate administrative procedures. Each has the opportunity to pursue these procedures further. Plaintiffs argue, however, that review of their claims by the Adjustment Board is a lengthy and cumbersome proceeding with delays of two years or more. That such delays exist, if in fact they do, is regrettable. But such matters are properly the subject of congressional concern. It would be unsound for this court to make the question whether plaintiffs can maintain this action in the federal courts depend

upon our determination as to how effectively the Adjustment Board is performing its congressionally mandated task. *See Walker v. Southern Railway Co.*, 385 U.S. 196, 201 (1966) (Harlan, J., dissenting).

The judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

No. 83-887

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

JUNIOR S. JACKSON,

*Petitioner,*

vs.

CONSOLIDATED RAIL CORPORATION,

*Respondent.*

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

## RESPONDENT'S BRIEF IN OPPOSITION

ALVIN E. DOMASH
HUGH C. GRIFFIN *
115 South LaSalle Street
Chicago, Illinois 60603
(312) 443-0342

WILLIAM E. HOLLAND
39 South LaSalle Street
Suite 1521
Chicago, Illinois 60603

*Attorneys for Respondent,*
CONSOLIDATED RAIL CORPORATION

*Of Counsel:*
LORD, BISSELL & BROOK
115 South LaSalle Street
Chicago, Illinois 60603

* Attorney of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0250

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

*Cases*

*Other Authorities*

In The

# Supreme Court of the United States

October Term, 1983

---

JUNIOR S. JACKSON,

*Petitioner,*

vs.

CONSOLIDATED RAIL CORPORATION,

*Respondent.*

---

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Consolidated Rail Corporation ("Conrail"), respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Seventh Circuit's opinion in this case reported at 717 F.2d 1045 (7th Cir. 1983).

## REASONS WHY THE WRIT SHOULD BE DENIED

Petitioner seeks review of a Seventh Circuit Court of Appeals decision that is not in conflict with any decision of any other Court of Appeals or with any State court

of last resort and does not depart from any accepted or usual course of judicial proceedings or sanction such a departure by any lower court (Supreme Court Rule 17). On the contrary, the Court of Appeals' opinion is consistent with:

1) Section 3 of the Railway Labor Act (RLA), 45 U.S.C. §153 First, setting up a uniform system of arbitration and appeal by which any union railroad employee, aggrieved by any employment-related discipline imposed by his employer, may seek review of that discipline order before the National Railroad Adjustment Board.

2) All prior decisions of this Court, e.g., *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320 (1972), and other federal and state courts recognizing the exclusive and mandatory jurisdiction of the National Railroad Adjustment Board over all employment-related grievance disputes between union railroad employees and their employers including all claims of "wrongful discharge."

3) All decisions of this Court, e.g., *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320 (1972), *Union Pacific Railroad Co. v. Sheehan*, 439 U.S. 89 (1978), and other courts of review recognizing that the Railway Labor Act, through the National Railroad Adjustment Board, is intended to provide a fair tribunal and a uniform method whereby all railroad employees throughout the nation, represented by counsel of their choice, can obtain complete review of and relief from any allegedly improper discipline order.

Furthermore, the basic premise underlying the entire petition, i.e. that the Seventh Circuit Opinion leaves railroad employees without any meaningful remedy against claims of retaliatory or other allegedly wrongful discharge (Petition, pp. 1, 6, 7, 11-12, 15) is without merit and

patently contrary to the express provisions of the Railway Labor Act providing that, upon reversal of any disciplinary action, the Adjustment Board may order the railroad to make any appropriate award including the payment of money to the aggrieved employee. 45 U.S.C. §153 First (m)(o).

## ADDITIONAL STATEMENT OF THE CASE

Petitioner was employed by Conrail as a maintenance of way track foreman (T. 173-174), he was a member of the Brotherhood of Maintenance of Way Employees (T. 521), he was covered by his union's collective bargaining agreement (T. 639, Pl. Ex. 16), and he was subject to the disciplinary, grievance and appeal procedures contained therein as well as those provisions of the Railway Labor Act providing for final and binding adjustment of all employee claims and grievances before the Railroad Adjustment Board, 45 U.S.C. Section 153 First (i).

Petitioner attempts to mislead the Court with his repeated assertion that Conrail "admitted" and "conceded" that petitioner was discharged in retaliation for filing his questionable* FELA action (Petition, pp. 8, 9, 13).

* The basic theory of plaintiff's FELA claim changed even after the trial had begun. In his pleadings prior to trial and after trial commenced, plaintiff contended that Conrail had violated the FELA by requiring him to lift 80 pound salt bags at the Wabash yards on February 3, 1978 (R. 1, 45, 57) and that this lifting activity aggravated a pre-existing ulcer condition (R. 152-153). At trial, after his medical expert testified that neither lifting salt bags nor any other physical exertion would aggravate an ulcer condi-

(Footnote continued on following page)

In truth, Conrail vehemently denied petitioner's contention that he was discharged in retaliation for filing his FELA suit and introduced abundant evidence to the contrary as follows:

**Institution Of Disciplinary Proceedings**

As required by petitioner's union's collective bargaining agreement (Pl. Ex. 16), the disciplinary proceedings which led to petitioner's discharge on April 20, 1981 were commenced by a letter from Conrail dated February 3, 1981 (Pl. Ex. 2) advising plaintiff of a formal hearing to be held at Fort Wayne, Indiana. This letter also set forth the specific Railroad Safety Rule violations with which he was charged.

**Hearing**

A hearing on the charges against petitioner was held on February 25, 1981 (Tr. 282). Petitioner did not attend the hearing although he was aware of the time and place of the hearing and he was physically able to attend (Tr. 283-284). He claimed that he did not go and that he asked for a continuance because he was unable to talk to his union representative (who was present at the hearing) (Tr. 283-284) and because his witnesses (never identified at the time of the hearing or at trial) were on vacation (Tr. 273-274). He admitted that the company clerk had called him on the morning of February 25, 1981 and advised him

---

* *continued*

tion (Tr. 577-578), plaintiff changed his theory and filed a Third Amended Complaint, omitting any reference to salt bags, and contending instead that his injuries were a result of long work hours during a winter blizzard (R. 101, Tr. 691).

that the hearing was going ahead as scheduled (Tr. 283). The clerk testified that petitioner told her that he was still not coming, that they should go ahead without him, and that he would "just let the chips fall where they may" (Tr. 356).

The hearing officer was Mr. R.D. Decker, Assistant Division Engineer (Tr. 352, 433). Petitioner's union representative, Mr. L.A. Felice, was present (Pl. Ex. 4). Also present was Mr. R.W. Meyers, Conrail's supervisor of track production; Mrs. Bodine, the chief clerk; and a stenographer (Pl. Ex. 4). After the hearing was completed, the transcript of the hearing was forwarded to the Division Engineer, Mr. W. L. Hammonds, for his decision on the discipline to be administered (Tr. 358, 612).

**Notice Of Discipline And Discharge**

Mr. Hammonds had reviewed 200 to 300 disciplinary cases (Tr. 601). After reviewing the transcript of the February 25, 1981 hearing and petitioner's prior disciplinary record, Hammonds, on April 20, 1981, issued a Notice of Discipline discharging petitioner (Tr. 199) (Pl. Ex. 5). The Notice of Discipline cited petitioner's violation of specific Railroad Safety Rules including petitioner's failure to immediately report his February 3, 1978 injury to a railroad supervisor (Pl. Ex. 6) (Tr. 614).

Petitioner admitted that he was fully aware of the injury reporting rule (Tr. 255, 307-308) and there was evidence that the injury reporting rule is considered particularly essential so that the railroad can: 1) ascertain that all necessary medical attention has been obtained; 2) investigate and take all necessary steps to prevent future accidents; and 3) report all accidents to the Federal Railroad Administration as required by law (T. 614-615). See 49 C.F.R. Section 225.5.

The Division Engineer, Mr. Hammonds, further testified that his decision to order dismissal in this case was based, not only on the rule violations set forth in the Notice of Dismissal, but also upon petitioner's prior disciplinary history which was as follows:

1) Petitioner had been disciplined for failure to obey a supervisor's orders in 1977 (Tr. 590, 516-517) and was demoted from track foreman to trackman. However, petitioner took an intra-company appeal as provided by his collective bargaining agreement and was ordered re-instated to his former position as foreman (Tr. 209).

2) Petitioner was also disciplined in 1979 as a result of a derailment (Tr. 209, 592). As foreman of the work, he had not complied with certain engineering standards as to ballast and railroad ties in the area of the derailment (Tr. 592). Petitioner also took an appeal from that discipline order which was still pending at the time of his discharge (Tr. 210).

3) Petitioner had also received a 30-day suspension for his failure to report another injury which was not involved in this case but which was the basis of another pending suit (Tr. 211).

**Appeal Process Available To Petitioner Under His Collective Bargaining Agreement And Under The RLA**

Mr. Hammonds testified that his discharge notice of April 20, 1981 was not "final" since petitioner was entitled to a three-level appeal above Hammonds (Tr. 595-599). In fact, Hammonds testified that he himself had once reversed a disciplinary action that had been taken against petitioner in another matter (Tr. 590-591).

The intra-company appeal procedures available to petitioner were set forth in Rules 34 and 35 of his union's

collective bargaining agreement (Pl. Ex. 16) (Tr. 639-640). Under these provisions, petitioner had 60 days to file a grievance claim seeking to overturn Hammonds' decision and to obtain reinstatement and back pay. If his grievance claim was disallowed, petitioner had another 60 days to file an appeal to the highest officer of the company designated to hear grievance claim appeals.

If petitioner still did not obtain satisfactory relief from Hammonds' decision, he then had 9 months to institute proceedings before the National Railroad Adjustment Board pursuant to the grievance review and appeal procedures set forth in the Railway Labor Act, 45 U.S.C. Section 153 First.

**Petitioner Ignores Appeal Process—Files Suit**

In the instant case, petitioner did not pursue any of the above avenues of appeal to which he was entitled under his collective bargaining agreement and under the Railway Labor Act, and as he had done in at least two prior disciplinary proceedings. Instead, less than three weeks after the notice of discipline was issued, petitioner amended the complaint in his pending FELA action to add a count alleging "retaliatory discharge" under Indiana law.

The District Court held that it had jurisdiction over said claim, and the Seventh Circuit, in accordance with the language, purpose and intent of the RLA and the clear holding of this Court in *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320 (1972), and its progeny, reversed. The FELA award was affirmed, *Jackson v. Conrail*, 717 F.2d 1045 (7th Cir. 1983).

## ARGUMENT

### I.

### THE COURT OF APPEALS ADHERED TO WELL-SETTLED LAW UNDER THE RAILWAY LABOR ACT RECOGNIZING THE EXCLUSIVE JURISDICTION OF THE NATIONAL RAILROAD ADJUSTMENT BOARD IN ALL EMPLOYMENT-RELATED GRIEVANCE DISPUTES BETWEEN UNION RAILROAD EMPLOYEES AND THEIR EMPLOYER.

#### Railway Labor Act

The law establishing the Railroad Adjustment Board's mandatory and exclusive jurisdiction over plaintiff's retaliatory discharge claim is set forth in Section 3 of the Railway Labor Act, 45 U.S.C. Section 153 First. Some of the more pertinent provisions are as follows:

> "(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, *shall be handled in the usual manner up to and including the chief operating officer of the carrier* designated to handle such disputes; but *failing to reach an adjustment in this manner, the disputes may be referred* by petition of the parties or by either party *to the appropriate division of the Adjustment Board* with a full statement of the facts and all supporting data bearing upon the disputes.
>
> * * *
>
> "(j) *Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect,* and the several divisions of the Adjustment Board shall give due notice of all hearings

to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

* * *

"(m) *The awards of the several divisions of the Adjustment Board shall be stated in writing.* A copy of the awards shall be furnished to the respective parties to the controversy, and *the awards shall be final and binding* upon both parties to the dispute." (Emphasis added).

In accordance with these provisions, petitioner's collective bargaining agreement specified that any employee aggrieved by any disciplinary decision of the railroad had the right to file a grievance claim and then to appeal that claim to the highest designated officer within the company (Pl. Ex. 16). If the desired relief still was not obtained, petitioner then had 9 additional months to file a claim with the Railroad Adjustment Board* in accordance with the provisions of the Railway Labor Act. (Pl. Ex. 16)

**Holding Of This Court In *Andrews***

The mandatory and exclusive jurisdiction of the National Railroad Adjustment Board to review and finally resolve

* Membership on the Adjustment Board is equally divided between representatives selected by the carriers and representatives selected by the labor organizations of the employees, 45 U.S.C. Section 153 First (a). The Board is comprised of various divisions to hear and finally determine employment disputes. The third division, which is comprised of ten members, five of whom are selected by the union and five of whom are selected by the carrier, hears all disputes involving maintenance of the way men such as petitioner, 45 U.S.C. Section 153 First (h). Provision is also made for system, group or regional boards to be established by voluntary agreement between the carriers and the unions, 45 U.S.C. Section 153 Second. If the members of the Board are deadlocked or evenly divided, a neutral "referee" is then chosen to cast the deciding vote, 45 U.S.C. Section 153 First (e).

all "wrongful discharge" and other employment grievances of railroad employees was unequivocally confirmed by this Court in *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320 (1972). In *Andrews*, plaintiff urged that defendant railroad had wrongfully refused to allow him to return to work following an automobile accident. He filed suit for "wrongful discharge", seeking damages for past and future wage loss. The District Court and the Court of Appeals dismissed the action on the ground that plaintiff's sole remedy was under the Railway Labor Act and that the method of review provided under the Act, including appeal to the National Railroad Adjustment Board, was exclusive and mandatory.

In an almost unanimous opinion (7 to 1), this Court affirmed and held:

> a) that the Railway Labor Act mandates compulsory arbitration of employee grievance disputes before the Railroad Adjustment Board which has exclusive jurisdiction under the Act to review and resolve all so-called "minor disputes" between railroad employees and their employers; and
>
> b) that all individual grievance matters of railroad employees covered by an existing collective bargaining agreement, including all discharge grievances whether characterized as "wrongful" or otherwise, are "minor disputes" subject to the exclusive jurisdiction of the Adjustment Board and the mandatory grievance review provisions of the Act, while a so-called major dispute exists only "when there is disagreement in the actual bargaining process for a new contract" (406 U.S. at 322).

In the language of the *Andrews* Court (406 U.S. at 322):

> "Provision for arbitration of a discharge grievance, a minor dispute, is not a matter of voluntary agreement under the Railway Labor Act; *the Act compels*

*the parties to arbitrate minor disputes before the National Railroad Adjustment Board established under the Act.* Quoting *Walker v. Southern R.Co.*, 385 U.S. 196, 198 (1966). (406 U.S. at 322) (Emphasis added.)

* * *

"[The] record is convincing that there was general understanding between both the supporters and the opponents of the 1934 amendment that the provisions dealing with the Adjustment Board were to be considered as *compulsory arbitration* in this limited field." (406 U.S. at 322 quoting from *Trainmen v. Chicago R.&I.R. Co.*, 353 U.S. 30, 33 (1957)) (Emphasis added.)

"Thus, the notion that the grievance and arbitration procedures provided for minor disputes in the Railway Labor Act are optional, to be availed of as the employee or the carrier chooses, *was never good history and is no longer good law.*" (406 U.S. at 322.) (Emphasis added.)

* * *

*"The fact that petitioner characterizes his claim as one for 'wrongful discharge' does not save it from the Act's mandatory provisions for the processing of grievances.* *** The fact that petitioner intends to hereafter seek employment elsewhere does not make his present claim against his employer any the less a dispute as to the interpretation of a collective bargaining agreement. *His claim is therefore subject to the Act's requirement that it be submitted to the Board for adjustment.*" 406 U.S. at 323-324. (Emphasis added.)

In *Union Pacific Railroad Co. v. Sheehan*, 439 U.S. 89 (1978), this Court reiterated the holding and rationale of *Andrews* and further expounded on the exclusive and mandatory jurisdiction of the Railroad Adjustment Board as follows:

> "In enacting this legislation, Congress endeavored *to promote stability in labor management relations in this important national industry by providing effective and efficient remedies for the resolution of railroad-employee disputes* arising out of the interpretation of collective bargaining agreements . . . *The Adjustment Board was created as a tribunal* consisting of workers and management *to secure* the prompt, orderly and *final settlement* of grievances that arise daily between employees and carriers regarding rates of pay, rules and working conditions . . . *Congress considered it essential to keep these so-called "minor" disputes within the Adjustment Board and out of the courts* . . . The effectiveness of the Adjustment Board in fulfilling its task depends on the *finality* of its determinations." *Sheehan*, 439 U.S. at 94. (Emphasis added.)

Numerous cases following *Andrews* and *Sheehan* have unanimously concluded that the federal district courts lack subject matter jurisdiction over suits alleging wrongful discharge or other purported state law tort actions which arise from or are related to employment grievances governed by the Railway Labor Act. See e.g. *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir. 1978), (no jurisdiction over purported state law tort action for "infliction of emotional distress" allegedly suffered by reason of discharge), *cert. den.* 439 U.S. 930; *Carson v. Southern Railway Co.*, 494 F.Supp. 1104 (D.S. Car. 1979) (no jurisdiction over purported state law tort action for "defamation" arising out of accusations made during discharge proceedings); *De La Rosa Sanchez v. Eastern Airlines, Inc.*, 574 F.2d 29 (1st Cir. 1978) (no jurisdiction over purported action for malicious deprivation of benefits); *Pandil v. Illinois Central Gulf R. Co.*, 312 N.W. 2d 139 (Ia. 1981) (no jurisdiction over alleged wrongful deprivation of retirement benefits), *cert.*

*den.* 456 U.S. 975; *Majors v. U.S. Air Inc.*, 525 F.Supp. 853 (D. Md. 1981) (no jurisdiction over purported state law tort action for "false imprisonment" arising from theft accusations by employer).

**The Instant Case Is Plainly Covered By The *Andrews* Holding And The Exclusive Remedy Provisions Of The Railway Labor Act**

In the instant case, petitioner claimed that his discharge was not based upon his violation of the Railroad Safety Rules or upon his prior disciplinary record, but was in retaliation for his filing of an FELA suit. As set forth in *Andrews* and its progeny *supra*, this is exactly the type of an employee grievance dispute and wrongful discharge type claim falling within the exclusive jurisdiction of the Railroad Adjustment Board under the Railway Labor Act. In the language of the Court of Appeals:

> "There is no question that Jackson's right not to be discharged at the will of Conrail grows out of the collective bargaining agreement. Similarly, there is no doubt that a retaliatory discharge is one variety of a 'wrongful discharge' claim." (717 F.2d at 1049).*

Petitioner had every right to take his "retaliation" claim to the Board if the intra-company grievance and appeal procedures afforded him by his collective bargaining agreement did not bring reinstatement, back pay, or any other monetary relief desired. Petitioner was well aware of these procedures and had pursued them successfully in

---

* Other cases have also used the terms "wrongful discharge" and "retaliatory discharge" interchangeably e.g. *Parner v. Americana Hotels, Inc.*, 652 P.2d 625 (Hawaii 1982); *Sventko v. Kroger Co.*, 245 N.W.2d 151 (Mich. App. 1976); *Cook v. Caterpillar Tractor Co.*, 407 N.E.2d 95 (Ill. App. 1980).

at least one prior grievance dispute. His decision here to forego these contractual and statutory remedies available to him, and instead to amend his FELA complaint to allege a state law tort action for retaliatory discharge,* did not enable him to avoid the exclusive remedy provisions of the Railway Labor Act or the exclusive and mandatory jurisdiction of the Railroad Adjustment Board, and the Seventh Circuit properly so held.

**None Of The Cases Cited In The Petition Are Applicable To The Facts At Bar**

The cases cited by petitioner fall into one or both of the following categories:

1) *Cases involving separate and independent "federal rights of action": Hendley v. Central of Georgia R.R. Co.*, 609 F.2d 1146 (5th Cir. 1980) (action under Section 60 of the FELA imposing penalties on anyone who attempts to prevent employees from voluntarily providing information to plaintiffs in FELA cases); *Johnson v. American Airlines, Inc.*, 487 F. Supp. 1343 (N.D. Tex. 1980) (action under Section 3 of the Age Discrimination In Employment Act); *Zipes v. Trans World Airlines, Inc.*,

* Under these facts, it is highly doubtful that petitioner even had a cause of action under state law. The case on which he relies, *Frampton v. Central Indiana Gas Co.*, 297 N.E.2d 425 (Ind. 1973), involved a terminable at-will employee with no other remedy or means of recourse for wrongful discharge. Subsequent cases recognizing *Frampton* have refused to extend its holding to employees, such as petitioner, who were working under a collective bargaining agreement, who were not terminable at-will, and who had the right of appeal from any discharge order. See *Cook v. Caterpillar Tractor Co.*, 407 N.E.2d 95 (Ill. App. 1980), *Suddereth v. Caterpillar Tractor Co.*, 449 N.E.2d 203 (Ill. App. 1983). Contra, *Wyatt v. Jewel Companies, Inc.*, 439 N.E.2d 1053 (Ill. App. 1982).

455 U.S. 385 (1982) (action under Title VII of the Civil Rights Act); *Colorado Anti-Discrimination Commission v. Continental Airlines, Inc.*, 372 U.S. 714 (1963) (suit under State Anti-Discrimination Act to enforce federally protected equal protection and due process rights to protect against racial discrimination in hiring).

None of these decisions has applicability to the case at bar. No provision of the FELA gives any right of action for retaliatory discharge, *Bay v. Western Pacific Railroad Co.*, 595 F.2d 514 (9th Cir. 1979), and thus petitioner candidly conceded in his Court of Appeals' brief that "plaintiff Jackson did not allege a cause of action [for] violation of federal statute in his retaliatory discharge claim" but instead relied solely on an alleged "violation of Indiana law" (Appellee's Br. 29).

2) *Cases not involving the Railway Labor Act and the exclusive and mandatory jurisdiction of the National Railroad Adjustment Board: Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978) (store owner obtained state court injunction against trespassing union picketers); *Farmer v. United Brotherhood of Carpenters and Joiners*, 430 U.S. 290 (1977) (union officer brought tort action against his union for conduct unrelated to actual employment discrimination); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981) (action under Section 6 of the Fair Labor Standards Act) and *Curtis v. Loether*, 415 U.S. 189 (1974) (action for violation of fair housing provisions of Title VIII of the Civil Rights Act) involved both a nonrailroad employee and a separate federal right of action. Petitioner also cites *Urie v. Thompson*, 337 U.S. 163 (1949), but the only issue before the *Urie* court was whether the FELA and the Boiler Inspection Act include

injuries in the nature of an occupational disease, such as silicosis.

Clearly none of these cases change, modify or even apply to the mandatory and exclusive jurisdictional provisions of the Railway Labor Act as those provisions were interpreted by the United States Supreme Court in *Andrews, supra* (406 U.S. at 322-325). As expressly noted by the Court of Appeals, there is a significant "difference" between the impact of the NLRA (National Labor Relations Act) and the RLA since "the RLA has made *any* grievance arising out of the collective bargaining agreement subject to the exclusive arbitral remedy contained in the Act" (emphasis in original) (717 F.2d at 1052) and "it is abundantly clear that resolution of [petitioner's] suit impinges on those areas left, under the RLA, to exclusive administrative resolution" (717 F.2d at 1054).

**There Is No Need For This Court's Review**

In sum, the principles determinative of the issue in this case have already been exhaustively reviewed and resolved by this Court in the *Andrews* and *Sheehan* opinions and uniformly interpreted by numerous lower courts of review. If this or any other purported wrongful discharge case were to be carved out of the statutory framework, there would be no logical or just stopping point, the acknowledged goal of stability and uniformity in the handling of employee disputes throughout the transportation industry would become impossible as the availability of a remedy would depend in each case on the vagaries of every individual state's tort law,* the exclusive and man-

* At least 30 states do not recognize any cause of action for "retaliatory discharge."

datory jurisdiction of the Railroad Adjustment Board would be undermined, and the federal court system would be clogged with all manner of railroad and other transportation employee grievance claims that Congress intended to be kept "out of the courts," *Union Pacific Railroad Co. v. Sheehan, supra*, 439 U.S. at 94.

The Seventh Circuit Court of Appeals correctly ruled that such a result would frustrate the legislative purpose of the Railway Labor Act and directly contradict the prior holdings of this Court and other courts of review that have interpreted the Act. There is no need for this Court to hold again what it has clearly and consistently held before.

## II.

## THE SEVENTH CIRCUIT PROPERLY REJECTED PETITIONER'S SEVENTH AMENDMENT ARGUMENT.

The Seventh Circuit correctly noted that petitioner's argument urging a Seventh Amendment right to a jury trial "requires only cursory consideration" (717 F.2d at 1049 fn.6). The Seventh Amendment's inapplicability to administrative adjudicatory proceedings was plainly enunciated by this Court in the very decision cited and relied upon by petitioner, *Curtis v. Loether*, 415 U.S. 189 (1974) (Petition, p. 22). The Civil Rights Act at issue in *Curtis* did not involve any administrative review proceeding, but rather an explicit statutory grant under 42 U.S.C. 3612 permitting the filing of civil damage actions in the district court. The distinction was stated in *Curtis* as follows (415 U.S. at 195):

> "[The] cases uphold congressional power to entrust enforcement of statutory rights to an *administrative*

*process* or specialized court of equity *free from the strictures of the Seventh Amendment.*" (Emphasis added)

This well-settled exception for statutory administrative process, ignored by petitioner in his carefully edited quote from the *Curtis* Opinion, has been uniformly recognized in the unanimous Circuit Court cases holding that the Seventh Amendment is inapplicable to proceedings under the RLA, and there is no point deserving of this Court's review. *Brotherhood of Railroad Trainmen v. Denver & R.G.W.R. Co.*, 370 F.2d 833, 836 (10th Cir. 1966), *cert. denied*, 386 U.S. 1016; *Essary v. Chicago & N.W. Transp. Co.*, 618 F.2d 13, 17 (7th Cir. 1980); *Magnuson v. Burlington-Northern, Inc.*, 413 F.Supp. 870, 873 (D. Mont.), *aff'd* 576 F.2d 1367 (9th Cir. 1978), *cert. denied*, 439 U.S. 930.

## III.

## THE SEVENTH CIRCUIT CORRECTLY HELD THAT THE DISTRICT COURT'S LACK OF SUBJECT MATTER JURISDICTION OVER THE RETALIATORY DISCHARGE CLAIM WAS NOT WAIVED.

It is difficult to conceive of any better-established rule in the federal judicial system than the fundamental principle that federal courts are tribunals of limited jurisdiction, 13 Wright & Miller, *Federal Practice & Procedure* §3522 and cases cited therein, e.g. *Victory Carriers, Inc. v. Law*, 404 U.S. 202.

It is equally fundamental that a federal court's lack of subject matter jurisdiction cannot be waived and may be raised at any time in the proceedings, even on appeal. *American Fire & Casualty Co. v. Finn*, 341 U.S. at 6, 17-18 (1951) (holding that lack of subject matter jurisdiction was properly raised even by a party who originally

invoked the federal court's jurisdiction in the first instance). The Circuit Courts have unanimously applied the same rule, e.g. *Sadat v. Mertes*, 615 F.2d 1176 (7th Cir. 1980); *Correa v. Clayton*, 563 F.2d 396 (9th Cir. 1977). The case cited by petitioner, *DiFrischa v. New York Central R.R. Co.*, 277 F.2d 141 (3d Cir. 1960), is not to the contrary. There it was simply held that a party would not be permitted to withdraw its stipulation of jurisdictional facts upon which a finding of diversity jurisdiction was then based.

## CONCLUSION

For the reasons stated herein, the writ of certiorari to the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

ALVIN E. DOMASH
HUGH C. GRIFFIN *
115 South LaSalle Street
Chicago, Illinois 60603
(312) 443-0342

WILLIAM E. HOLLAND
39 South LaSalle Street
Suite 1521
Chicago, Illinois 60603

*Attorneys for Respondent,*
CONSOLIDATED RAIL CORPORATION

*Of Counsel:*
LORD, BISSELL & BROOK
115 South LaSalle Street
Chicago, Illinois 60603

* Attorney of Record